



# **National Disability Policy: A Progress Report**

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**Has the Promise Been Kept? Federal Enforcement  
of Disability Rights Laws**

**National Council on Disability**

October 31, 2018

National Council on Disability (NCD)  
1331 F Street NW, Suite 850  
Washington, DC 20004

***National Disability Policy: A Progress Report  
Has the Promise Been Kept? Federal Enforcement of Disability Rights Laws***

National Council on Disability, October 31, 2018

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## National Council on Disability

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An independent federal agency making recommendations to the President and Congress to enhance the quality of life for all Americans with disabilities and their families.

### Letter of Transmittal

October 31, 2018

President Donald J. Trump  
The White House  
1600 Pennsylvania Ave., NW  
Washington, DC 20500

Dear Mr. President,

The National Council on Disability (NCD) is pleased to present the 2018 *National Disability Policy: A Progress Report*, this year titled *Has the Promise Been Kept? Federal Enforcement of Disability Rights Laws*. Each year, NCD submits a statutorily mandated report to the White House and Congress to offer recommendations on continuing, new, and emerging issues that affect the lives of people with disabilities.

In this report, the Council revisits the NCD report *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act*, released in 2000, to assess the progress made by the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Access Board to address NCD's recommendations in the 2000 report. NCD uses the framework developed in *Promises to Keep* to consider the efforts of the U.S. Department of Labor's (DOL) Employment and Training Administration, Office of Disability Employment Policy, Office of Federal Contract Compliance Programs, Office of the Solicitor, and the Wage and Hour Division to protect and advance the employment of people with disabilities. NCD received the Department of Labor's Civil Rights Center's response to NCD's research questions after completion of NCD's examination of DOL, and thus it has not been analyzed. Therefore, we have appended their unedited response to ensure its inclusion in this report.

The federal agencies considered in this report play a key role to ensure that people with disabilities have the equal opportunity to work and access the community as all Americans. This report assesses how these agencies implement and enforce the Americans with Disabilities Act and other federal disability rights laws and programs.

NCD submits this report at a time of economic expansion, job growth, and technological advancements, which are expanding opportunities for people with disabilities. Enforcement and effective implementation of federal disability civil rights laws and employment programs are vital for people with disabilities to share fully in the American economy, to participate in the local and national community, and to interact with the Federal Government. Although some progress in reaching the goal of full equality and justice for Americans with disabilities has been made since the release of *Promises to Keep*, improvements are needed. NCD offers recommendations to enhance the investigative and compliance efforts of the EEOC, DOL, and the Access Board

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in order to respond to ongoing and emerging barriers faced by people with disabilities. NCD encourages these agencies to improve communications with people with all types of disabilities, and to better utilize existing resources in investigations and compliance efforts.

NCD looks forward to working with the Administration to ensure the ongoing protection of people with disabilities from discrimination in all aspects of their lives through oversight and enforcement of our nation's disability rights laws.

Respectfully,

A handwritten signature in black ink that reads "Neil Romano". The signature is written in a cursive style with a long, sweeping tail on the letter "o".

Neil Romano  
Chairman

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## Acknowledgments

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## Executive Summary

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For the past 45 years, as measured from the enactment of the Rehabilitation Act in September of 1973, the United States has through legislation gradually improved the ability of people with disabilities to live, work, and participate fully in the community. Passage of the Americans with Disabilities Act in 1990 (ADA), and later the ADA Amendments Act (ADAAA) in 2008, played major roles in the increased protection of the rights of people with disabilities. In between these landmark statutes, numerous other federal laws, regulations, and Executive Orders have sought to increase the opportunities for people with disabilities. In some cases, as with Section 511 of the Workforce Innovation and Opportunity Act (WIOA) of 2014, such laws attempt to temper the adverse effects of other federal laws which restrict the opportunities for people with disabilities. The creation of federal disability civil rights and programs through legislative action, however, is only one step to fully achieve equal opportunities for people with disabilities. Effective federal oversight and enforcement of federal law is critical to keep advancing justice and equality for people with disabilities.

This Progress Report, *Has the Promise Been Kept? Federal Enforcement of Disability*

*Rights Laws*, undertakes a partial revisit of a 2000 National Council on Disability (NCD) report titled *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act*. *Promises to Keep* considered the ADA enforcement efforts of the Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ), the Department of Transportation (DOT), and the Federal Communications Commission (FCC), with minor consideration of the Architectural and Transportation Barriers Compliance Board (Access Board). Using 11 guidepost elements created in *Promises to Keep* to assess disability civil rights enforcement, this 2018 report addresses the efforts of the EEOC, Department of Labor (DOL), and the Access Board to enforce and implement the ADA and other federal disability rights laws and programs.

Legal progress to ensure greater opportunities for people with disabilities has occurred since *Promises to Keep*, best exemplified by the bipartisan passage of the ADAAA. Federal enforcement agencies, however, still face, or themselves create, bureaucratic, communications, budgetary, regulatory, staffing, and in some cases technological hurdles that can negatively impact

the full realization of equal rights for people with disabilities. Among some of the key findings are the following:

- The number of discrimination complaints filed with EEOC increased significantly after passage of the ADA, as has the number of ADA cases filed by the EEOC in federal court. The EEOC, however, lacks a strong public quality assurance document to assess ADA investigations, does not clearly articulate how people with disabilities can request an accommodation through the new online public portal, and its investigative priority assignment system has the potential to negatively impact people with certain disabilities.
- DOL's Office of Federal Contract Compliance Programs (OFCCP), responsible for oversight of affirmative action for people with disabilities by federal contractors under Section 503 of Rehabilitation Act, conducts a small number of compliance reviews of federal contractors and almost exclusively uses conciliation agreements to address violations.
- DOL's Wage and Hour Division (WHD), has made leadership, management, and enforcement progress in oversight of the Section 14(c) subminimum wage program in the Fair Labor Standards Act, but does not investigate employers who do not renew 14(c) certificates or seek new resources to train investigators committed to 14(c) enforcement, and possesses an antiquated data system.
- The Access Board has developed important accessibility standards and the Board's

committees help identify emerging issues and to shape the research agenda. The Board, however, receives few complaints of inaccessible federal buildings and physical environments, and despite the ability to investigate based on noncomplaint information, relies solely on individual complaints.

Among NCD's recommendations in this report are the following:

- That the EEOC create a specific method to assess the quality of ADA investigations, develop simpler documents, provide explicit explanation for requesting accommodations in the charge filing process, improve the response time to complainants, and study the charge investigations priority system.
- That ODEP revisit prior recommendations and evaluate how they have been adopted, continue to focus on persons with significant long-term disabilities seeking to enter the workforce, and that Congress and the President require relevant agencies to consult with ODEP.
- That OFCCP modify its compliance review procedures and improve staff levels to better identify and deter violations of Section 503 and ensure the focus in regulatory development is on the advancement of employment of people with disabilities.
- That WHD improve data collection and analysis, use directed investigations in Section 14(c) enforcement, increase education on the rights of workers paid a

subminimum wage, and analyze Family and Medical Leave Act violations.

- That the Access Board expedite the development of needed standards,

investigate key parts of a facility during a complaint investigation, ensure timely completion of investigations, and partner with other enforcement agencies.



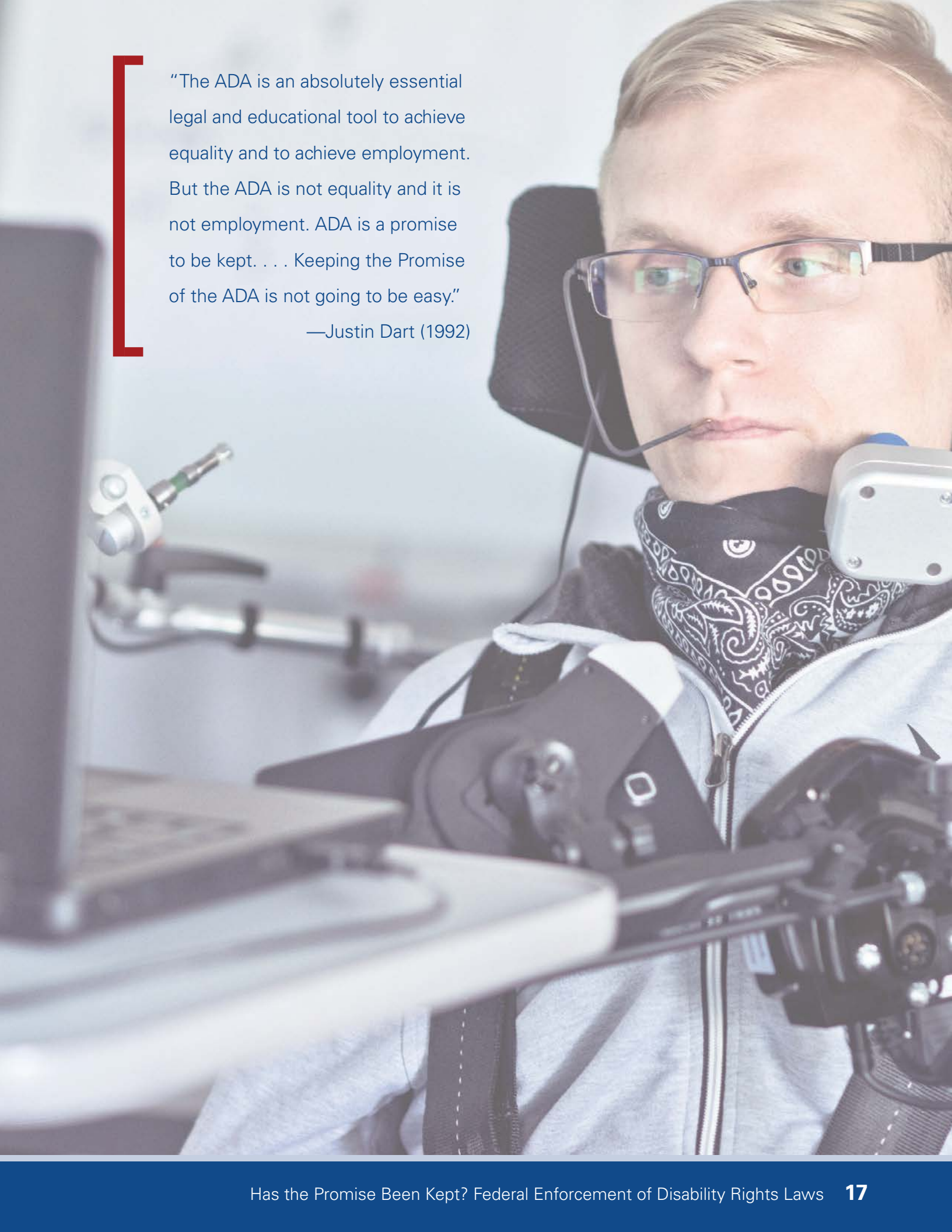


## Acronym Glossary

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ABA	Architectural Barriers Act
ADA	Americans with Disabilities Act of 1990
ADAAA	ADA Amendments Act of 2008
AJC	American Job Center
CRC	Civil Rights Center
CRP	Community Rehabilitation Program
DEI	Disability Employment Initiative
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
EARN	Employer Assistance and Resource Network on Disability Inclusion
EEOC	Equal Employment Opportunity Commission
EO	Executive Order
ETA	Employment and Training Administration
FEPA	Fair Employment Practice Agency
FLSA	Fair Labor Standards Act
FMLA	Family Medical Leave Act
FTE	Full-Time Equivalent
FY	Fiscal Year
GAO	Government Accounting Office
GINA	Genetic Information Nondiscrimination Act
JAN	Job Accommodation Network
LEAD	Leadership for the Employment and Advancement of People with Disabilities
MOU	Memoranda of Understandings
NCD	National Council on Disability
ODEP	Office of Disability Employment Policy
OFCCP	Office of Federal Contract Compliance Programs
OGC	Office of General Council (EEOC)
OLC	Office of Legal Council (EEOC)
PTSD	Post-Traumatic Stress Disorder
RSA	Rehabilitation Services Administration
SEED	State Exchange on Employment and Disability
SOL	Office of the Solicitor

SWEPs	School Work Experience Programs
TA	Technical Assistance
VEVRA	Vietnam Era Veterans' Readjustment Assistance Act
WHD	Wage and Hour Division
WIOA	Workforce Innovation and Opportunity Act

A close-up photograph of a man with light-colored hair and glasses, wearing a headset with a microphone. He is looking intently at a computer monitor. He is using a specialized, large, black computer mouse with multiple buttons and a joystick. He is wearing a grey zip-up jacket over a black bandana with a white paisley pattern. The background is slightly blurred, showing a desk with a laptop and other office equipment.

“The ADA is an absolutely essential legal and educational tool to achieve equality and to achieve employment. But the ADA is not equality and it is not employment. ADA is a promise to be kept. . . . Keeping the Promise of the ADA is not going to be easy.”

—Justin Dart (1992)



## Introduction

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The National Council on Disability (NCD) is congressionally mandated to advise the President, Congress, and other policymakers on disability policies and practices that enhance equal opportunity for people with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society. This Progress Report titled *Has the Promise Been Kept?* fulfills NCD's congressional mandate by advising policymakers on policies and practices that enable federal agencies to effectively enforce federal disability rights laws.

The United States has been at the forefront in the legal advancement of the rights of people with disabilities, led by people with disabilities who demanded equality and justice. Though the legislative recognition by the United States that disability rights are civil rights has not been swift, the disability rights movement was the impetus for a number of federal civil rights laws, most notably the Americans with Disabilities Act (ADA) of 1990<sup>1</sup> to ensure equal opportunity for people with disabilities. Several of these federal enactments are described in Appendix B.

Enforcement of the ADA is critical to provide equal opportunity across all aspects of community life for people with disabilities, and in 2000 NCD issued *Promises to Keep: A Decade of Federal Enforcement of the Americans with*

*Disabilities Act*, the third in a series of reports on the ADA.<sup>2</sup> In *Promises to Keep*, NCD considered the ADA enforcement activities of the U.S. Equal Employment Opportunity Commission (EEOC), the U.S. Department of Justice (DOJ), the U.S. Department of Transportation (DOT), and the Federal Communications Commission (FCC), and addressed the technical assistance activities of the Architectural and Transportation Barriers Compliance Board (Access Board), the National Institute on Disability and Rehabilitation Research (NIDRR), and the then President's Committee on the Employment of People with Disabilities (PCEPD).

In *Promises to Keep*, NCD recognized that "the placement of disability discrimination on par with race or gender discrimination exposed the common experiences of prejudice and segregation and provided clear rationale for the elimination of disability discrimination in this country."<sup>3</sup> NCD found that federal agencies charged with ADA enforcement and policy development were "overly cautious, reactive, and lacking a coherent and unifying national strategy."<sup>4</sup> Enforcement efforts largely followed "a case-by-case approach based on individual complaints rather than one based on compliance monitoring and a cohesive, proactive enforcement strategy."<sup>5</sup> NCD also found that the "five federal agencies tasked to enforce the ADA

## 2000 Review of ADA Enforcement

[In 2000], NCD found that federal agencies charged with ADA enforcement and policy development were “overly cautious, reactive, and lacking a coherent and unifying national strategy.” . . . NCD also found that the five federal agencies tasked to enforce the ADA were not working in collaboration to develop a national strategy on enforcement.”

were not working in collaboration to develop a national strategy on enforcement.”<sup>6</sup>

Much has happened since *Promises to Keep*. Technological advances, especially the rapid expansion of the Internet and social media, have revolutionized the workforce and social interaction. New technologies and digital platforms have increased opportunities for telework, created new employment arrangements, and expanded the range of assistance and accommodations available to people with disabilities. Personal digital devices have offered autistic persons new ways to interact and communicate with family, friends, and the larger community. Improvements in screen-reading, dictation, and similar software have increased the accommodations available for the Deaf or Hard of Hearing and the blind or visually impaired. In 2008, with overwhelming bipartisan support, Congress passed the ADA Amendments Act (ADAAA or Amendments Act) in response to the weakening of the ADA by the federal courts.<sup>7</sup> In 2008, Congress prohibited discrimination based on genetic information through the Genetic Information Nondiscrimination Act (GINA),<sup>8</sup> and in 2014

reauthorized and amended the Rehabilitation Act through the Workforce Innovation and Opportunity Act (WIOA).<sup>9</sup> Despite these advances, however, discrimination and outright exploitation of people with disabilities continues, perhaps best exemplified by the horrific abuse of dozens of men with intellectual disabilities working for decades at a turkey processing plant in Atalissa, Iowa, a situation that was brought to light in 2009.<sup>10</sup>

Justin Dart Jr., the “father of the ADA,” offered prophetic remarks in a February 6, 1992, speech:

[The ADA] . . . is a landmark breakthrough. People with disabilities have been granted full, legally enforceable equality by one of the world’s most influential nations. . . . The ADA is an absolutely essential legal and educational tool to achieve equality and to achieve employment. But the ADA is not equality and it is not employment. ADA is a promise to be kept. And what is that promise? For whatever the law says legally, the clear promise of the ADA is that all people with disabilities will be fully equal, fully productive, fully prosperous, and fully welcome participants in the mainstream. Keeping the Promise of the ADA is not going to be easy.<sup>11</sup>

As the 30th anniversary of the ADA approaches, the nation must ask, “Has the promise been kept?” In this report, NCD uses 11 elements created in *Promises to Keep* which assess the oversight and enforcement of federal disability rights and programs by the EEOC, the U.S. Department of Labor (DOL), and the Access Board. This report revisits some recommendations made in *Promises to Keep* and to evaluate progress made by the EEOC,

while for the first time using the *Promises to Keep* framework to consider the role of DOL in the enforcement of federal rights and the development of programs that affect people with disabilities. The following three chapters provide an analysis and recommendations for these agencies. Appendix C contains a further overview of *Promises to Keep* and the research methodology used in this report.

NCD appreciates and thanks the leadership and staff of the federal agencies considered

in this report for their time and assistance in providing data and information and responding to many questions from our researchers. NCD understands that federal civil rights enforcement agencies are charged with a difficult task to protect the integrity of all civil rights laws within increasingly constrained resources. Nevertheless, improvement is always possible, and often necessary, to ensure the vigorous enforcement of disability rights and all civil rights.





# Chapter 1: U.S. Equal Employment Opportunity Commission

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Passage of the ADAAA was the most important development to impact the enforcement of disability rights laws by the EEOC since *Promises to Keep*. The ADAAA resulted in an increase in the number of ADA charges of discrimination

filed with the Commission, as well as in EEOC-initiated ADA litigation. While the EEOC has, either purposefully or because of other policy considerations, followed some recommendations in *Promises to Keep*, other areas remain unfilled.

## **Based upon the analysis contained in this chapter, NCD recommends that the EEOC:**

- Revise the ADA and GINA regulations that allow employees with disabilities to participate in any voluntary employer wellness program while fully protecting the right not to disclose protected medical information.
- Track and analyze data from federal agencies on a quarterly basis to ensure the agencies meet targeted employment goals under Section 501 of the Rehabilitation Act regulations.
- Make the District Complement Plans to the Strategic Enforcement Plan (SEP) available for public review, if necessary, by redacting law enforcement strategies, to allow for an assessment of the implementation of the SEP at the district level.
- Publicly post data on how it has fulfilled the SEP objective to reduce the barriers faced by applicants with disabilities in the application and hiring processes.
- Publish a detailed report of the impact of the ADAAA on the number, disability type, discrimination alleged, and final resolution of ADA charges since passage of the ADAAA.
- Evaluate the impact of the priority charge classification process on people with disabilities to determine to what extent the disability may result in a low classification because of the disability.

*(continued)*

**Based upon the analysis contained in this chapter, NCD recommends that the EEOC: *continued***

- Clearly identify on the EEOC public portal how a person with a disability can request a reasonable accommodation to file a charge and the other available options for a person with a disability to begin the charge filing process.
- Create and post on its website videos in American Sign Language (ASL) about the charge filing, mediation, and investigation processes, as well as important guidance on all laws enforced by the EEOC.
- Improve the public understanding of the relationship between the EEOC and the Fair Employment Practice Agencies (FEPAs) by requiring appropriate explanations on both EEOC and FEPA webpages and fact sheets.
- Track the training completed by FEPA staff on the ADA and other federal disability rights laws as part of oversight of the quality of the work of the FEPAs and take appropriate steps to address low participation.
- Develop ADA fact sheets and guidance documents for the general public in more simple language that take into account persons with various disabilities and continue to create detailed guidance documents about the ADA that benefit employers, advocates, and the courts.
- Create, with input from the disability community, a specific method to assess the quality of EEOC investigations of ADA charges as detailed in this chapter.
- Develop investigators who are specialists in disability issues and devoted specifically to investigate ADA charges.
- Improve communications with people who file a charge by requiring that investigators respond to inquiries for charging parties within 30 days of the inquiry.
- Prioritize the reduction of the charge inventory and processing times through an increase in staff levels.
- Increase the required frequency of the meetings of the EEOC and DOL Office of Federal Contract Compliance Program Compliance Coordination Committees.

***Overview of the EEOC***

Established in 1964 through Title VII of the Civil Rights Act of 1964,<sup>12</sup> the EEOC is responsible for the enforcement of federal antidiscrimination laws, including Title I of the ADA and more recently Title II of GINA, as applicable to private and state and local government employers,

employment agencies, and unions. The EEOC also is responsible for the enforcement of Sections 501 and 505 of the Rehabilitation Act applicable to federal employees.

The EEOC is headed by five Commissioners, appointed by the President and confirmed by the Senate for a five-year term. No more than

## **NCD recommends that Congress and the President:**

- Eliminate budget and hiring barriers, such as hiring freezes and unfunded mandatory pay increases, which prevent the EEOC from maintaining necessary staff levels.

three Commissioners may be from the same political party. The EEOC Chair is appointed by the President from among the Commissioners. The EEOC General Counsel, who brings litigation on behalf of the Commission, is also appointed by the President but confirmed by the Senate for a four-year term.<sup>13</sup> Organizationally the EEOC is divided into the Offices of Field Programs, Legal Counsel, General Counsel, Federal Operations, and a number of other offices. Geographically, the Commission maintains 15 districts containing a total of 52 district, field, area, and local offices; a headquarters office in Washington, DC; and a separate Washington, DC, field office.

The Offices of Field Programs and General Counsel, and the individual EEOC field offices “ensure that EEOC effectively enforces the statutory, regulatory, policy, and program responsibilities of the Commission through a variety of resolution methods tailored to each” discrimination complaint, called the “charge of discrimination.”<sup>14</sup> The Office of Legal Counsel (OLC) develops regulations and policy guidance, provides technical assistance to employers and employees, and coordinates with other agencies and interested parties regarding the statutes and regulations enforced by the EEOC. The OLC was critical in the development of the EEOC regulations following the ADAAA.

The Office of Federal Operations (OFO) is responsible for the development and implementation of affirmative action employment policies by the federal agencies, and compliance

with the adjudication system for federal employees who file discrimination employments, which includes administration of the review of the appeals process for federal employment discrimination complaints. Given the nature of the federal enforcement system in comparison with other employers, the OFO was not analyzed for this report.

### ***Regulatory, Sub-Regulatory, and Policy Guidance***

After enactment of the ADAAA, the EEOC revised the ADA Title I regulations, which became effective on May 24, 2011.<sup>15</sup> Key elements of the ADAAA regulations, consistent with the Act, included that (1) the definition of “disability” shall be interpreted broadly, and that (2) to meet the standard of the term “substantially limits,” the limitation need not “significantly” or “severely” restrict a major life activity.<sup>16</sup> The EEOC further redefined the term “major life activities” through the creation of two nonexhaustive lists derived from the Amendments Act. The first list defines various activities as “major life activities,” while the second list defined “major life activities” to include “major bodily functions” and provided a list of such functions.<sup>17</sup> A person who is substantially limited in one of the major bodily functions listed in the revised EEOC regulations now meets the ADA definition of “disability.”

Consistent with the ADAAA, the updated EEOC regulations provide that mitigating

measures other than “ordinary eyeglasses or contact lenses,” shall not be considered in assessing whether an individual has a “disability.” As important, following the ADA the regulations provide that even if an impairment is episodic or in remission, it is still a disability under the ADA if it would substantially limit a major life activity when active.<sup>18</sup> To comply with the Amendments Act, the EEOC changed the regulatory definition of being “regarded as” a person with a disability, to make it less burdensome to show an employer discriminated against a person on this basis.<sup>19</sup> The regulations further set out a list of impairments that in almost all cases after an individualized assessment will substantially limit a major life activity.<sup>20</sup>

The EEOC revised an accompanying ADA interpretive guidance to the regulations,<sup>21</sup> and issued various interpretative and enforcement related materials such as sub-regulatory guidance voted on by the Commissioners and which the EEOC voluntarily opens for public input.<sup>22</sup> The EEOC also issues resource documents such as Fact Sheets, Questions and Answers, Technical Assistance, Best Practices, or similarly titled material which are approved by the EEOC Chair without the need for a vote.<sup>23</sup> When the ADA regulations were finalized, the EEOC issued a number of sub-regulatory guidance documents to help employers and employees better understand the new law. The EEOC also published a fact sheet, a general Question and Answer, and a Question and Answer specific to small businesses about the final regulations.<sup>24</sup> These included two documents<sup>25</sup> that explain that applicants and employees with HIV are protected from employment discrimination and harassment and have a right to reasonable accommodations, and which offer doctors instructions on how to provide

medical documentation to support a patient with HIV who requests an accommodation at work.<sup>26</sup>

The Commission published a document titled “Employer-Provided Leave and the Americans with Disabilities Act,” which addresses the sometimes-complex issues of the rights of employees with disabilities who seek leave as a reasonable accommodation.<sup>27</sup> Since *Promises to Keep*, the EEOC has released resource documents about ADA rights largely directed to members of the public. The Commission created Questions and Answers for persons with disabilities such as on cancer, diabetes, and epilepsy, and a Question and Answer on the legal rights in the workplace related to depression, post-traumatic stress disorder (PTSD), and other mental health conditions.<sup>28</sup> The EEOC released a document to help medical professionals understand what information they should provide in support of employees with mental health disabilities in need of reasonable accommodations.<sup>29</sup>

GINA, which took effect in November 2009, prohibits the use of genetic information by an employer in making decisions such as hiring, firing, and job assignments or involving other aspects of employment such as pay, fringe benefits, or other terms and conditions of employment; restricts the ability to request and purchase genetic information; and strictly limits the disclosure of genetic information. The EEOC issued regulations for Title II of GINA effective as of January 2011.<sup>30</sup> Consistent with GINA, the regulations define “genetic information” to include information about the results of genetic tests of the person or their family members, as well as information about the manifestation of a disease or disorder in a person’s family medical history.<sup>31</sup> The use of genetic information to make employment decisions is prohibited because such information is not relevant to a

person's current ability to work.<sup>32</sup> Harassment based on genetic information and retaliation against a person who asserts a protected right under GINA is also prohibited similar to other federal laws.<sup>33</sup>

Both the ADA and GINA place restrictions on when an employer may require a job applicant or an employee to disclose medical or genetic information. These Acts allow an employer to request the "voluntary" disclosure of medical or genetic information from an employee for the purpose of participation in an employer-sponsored wellness program. Prior to 2016, the EEOC took "the position that in order for a wellness program to be 'voluntary,' employers could not condition the receipt of incentives on the employee's disclosure of" medical or genetic information.<sup>34</sup>

The 2010 Patient Protection and Affordable Care Act made changes related to employer-sponsored wellness plans.<sup>35</sup> In response, the EEOC amended the ADA and GINA regulations to allow an employer to entice an employee to voluntarily disclose medical information from the employee, or information about an employee's spouse's manifestation of disease or disorder, as part of a requirement to participate in a voluntary wellness plan.<sup>36</sup> The revised voluntary wellness regulations permitted an employer to offer an "incentive" of up to 30 percent off the total cost of self-only medical insurance coverage.<sup>37</sup> The revised EEOC regulations thus imposed a very difficult choice for people with disabilities to either forgo a substantial savings on health care of up

to 30 percent depending on the employer or exercise a right not to disclose a disability.

In October 2016, AARP challenged the regulations as coercive by forcing employees with disabilities to pay more for health insurance if they decided not to reveal confidential medical information to a voluntary wellness program. AARP in essence argued that the 30 percent incentive rendered the wellness programs no longer truly "voluntary."<sup>38</sup> A U.S. district court agreed with AARP and ruled in August 2017 that the EEOC failed to provide a reasoned explanation for its interpretation of the "voluntary" requirement.<sup>39</sup> The court later

vacated a portion of the regulations related to incentives that will cease to be effective as of January 1, 2019.

**NCD recommends that any revised future ADA and GINA regulations by the EEOC allow employees with**

**disabilities to participate in any voluntary employer wellness program while fully protecting the right not to disclose protected medical information for such participation.**

Section 501 of the Rehabilitation Act prohibits the Federal Government from discriminating against employees with disabilities and requires federal agencies to develop an affirmative action plan for the recruitment, placement, and advancement of people with disabilities.<sup>40</sup> For decades, the Section 501 regulations simply stated that the Federal Government should be a "model employer" for people with disabilities. The EEOC had issued various Management Directives providing some guidance on how a federal agency's plan should result in the Federal

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*The revised EEOC regulations thus imposed a very difficult choice for people with disabilities to either forgo a substantial savings on health care of up to 30 percent depending on the employer or exercise a right not to disclose a disability.*

Government being a model employer. Over the years, Executive Orders have been issued that require federal agencies to develop reasonable accommodation policies and set government-wide goals for federal hiring of people with disabilities. The more recent Executive Orders included sub-goals for hiring people with significant disabilities.<sup>41</sup>

In May 2014, the EEOC requested public comment on specific inquiries for ways to strengthen the Section 501 affirmative action regulations.<sup>42</sup> In February 2016, the EEOC proposed specific revisions to the regulations,<sup>43</sup> and issued final regulations in January 2017, which became applicable on January 3, 2018.<sup>44</sup> The EEOC gathered into a single regulation those requirements previously found in a variety of documents and clarified that the regulations have the force of law. The new regulations require each federal agency to take steps reasonably designed to gradually increase the number of employees with disabilities and with targeted disabilities until the agency meets specific goals set by the EEOC. Significantly, the regulations also require each agency to provide employees with targeted disabilities Personal Assistance Services during work hours and work-related travel, if necessary.<sup>45</sup>

It is too early to gauge any impact of the new Section 501 regulations on federal hiring. By setting specific steps that agencies must take, however, the rule has the potential to move the Federal Government forward in the hiring, placement, and advancement of people with disabilities and with a specific emphasis

on people with significant disabilities. **NCD recommends that the EEOC track and analyze data from federal agencies on a quarterly basis to ensure the agencies are meeting targeted employment goals under the Section 501 regulations.**

### ***Proactive and Reactive Strategies***

Since *Promises to Keep*, the EEOC continues to revise the agency's strategic planning in an effort to better utilize Commission resources. The EEOC no longer uses the National Enforcement Plan referred to in *Promises to Keep*.<sup>46</sup> As required by Congress, the

Commission develops a five-year agency-wide Strategic Plan.<sup>47</sup> The FY 2012–2016 EEOC Strategic Plan called for the development of a separate, more focused five-year Strategic Enforcement Plan (SEP),

and the FY 2018–2022 Strategic Plan called for consistent implementation.

The FY 2018–2022 Strategic Plan also lays out two broad strategic objectives to “combat and prevent employment discrimination through the strategic application of EEOC’s law enforcement authorities,” “prevent employment discrimination and promote inclusive workplaces through education and outreach,” and a broad management objective to “achieve organizational excellence.”<sup>48</sup> The FY 2012–2016 Strategic Plan contained similar objectives.<sup>49</sup>

The more specific SEP for FY 2017–2021 includes six substantive enforcement priorities: (1) eliminating barriers in recruitment and hiring, (2) protecting vulnerable workers

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***Significantly, the [EEOC] regulations also require each agency to provide employees with targeted disabilities Personal Assistance Services during work hours and work-related travel, if necessary.***

(which includes underserved communities) from discrimination, (3) addressing selected emerging and developing issues, (4) ensuring equal pay protections for all workers, (5) preserving access to the legal system, and (6) preventing systemic harassment.<sup>50</sup> In the current SEP, the Commission reaffirmed, with some modification and additions, the priorities in the SEP for FY 2013–2016.<sup>51</sup> The modifications include extending a priority on equal pay to reach all workers protected under federal law, and indicating that the EEOC will focus on qualifications standards and inflexible leave policies that discriminate against people with disabilities as part of addressing developing issues.

Finally, the SEP requires that the EEOC districts and the Washington, DC, Field Office establish District Complement Plans to identify how the districts will implement the SEP and areas of emphasis to address local situations.<sup>52</sup> The Commissioners review the District Complement Plans, but the plans are considered confidential enforcement documents and not made public. Therefore, it is not possible to assess the degree to which local plans and the SEP are consistent as recommended in *Promises to Keep*.<sup>53</sup> **NCD recommends the EEOC make the District Complement Plans to the Strategic Enforcement Plan available for public review, if necessary by redacting law enforcement strategies to allow the public to assess the implementation of the SEP at the district level.**

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The SEP priority to eliminate barriers to recruitment and hiring aligns, to an extent, with a *Promises to Keep* recommendation that the EEOC prioritize addressing the problems people with disabilities face in entering the workforce and removing barriers to the application and hiring process.<sup>54</sup> Under the SEP, the EEOC prioritizes charges of discrimination that suggest an employer uses “exclusionary policies and practices, the channeling/steering of individuals into specific jobs due to their status in a particular group, job segregation, restrictive application processes (including online systems that are inaccessible to individuals with disabilities), and

screening tools that disproportionately impact workers based on their protected status (e.g., . . . medical questionnaires impacting individuals with disabilities).”<sup>55</sup> **NCD recommends the EEOC publicly post data on how it has fulfilled the SEP objective to reduce the barriers faced by applicants with disabilities in the application and hiring process.**

The EEOC collects aggregate enforcement data, including on charges filed by people with disabilities and EEOC litigation under the ADA. In part, this is consistent with recommendations in *Promises to Keep* that the EEOC better collect and analyze enforcement data.<sup>56</sup> The EEOC tracks ADA discrimination charges using 45 disability categories, as well as ADA charges based upon a person alleging to have been regarded as a person with a disability or for being associated with a person with a disability.

The total number of charges filed under the ADA increased significantly following enactment of the ADAAA. Total ADA charges filed increased 58 percent when comparing the period FY 2000 to 2008, before the effective date of the ADAAA, with the period FY 2009 to 2017 after the ADAAA.<sup>57</sup> Chart 1 provides a comparison of the total number of ADA charges received and resolved by the EEOC in the nine years before and the nine years after the effective date of the ADAAA.

The average annual number of ADA charges filed increased from about 16,000 charges a year between FY 2000 and 2008, to 25,700 charges a year between FY 2009 and 2017. During FY 2009 to 2017, 85,236 more ADA charges were filed than for the FY 2000 to 2008 period. The increase in ADA charges

filed with the EEOC since 2009 exceeded the increase in charges for all other protected classes for which the EEOC has had authority since 2000 (age, color, national origin, race, religion, and sex).<sup>58</sup> Furthermore, monetary relief obtained through the EEOC process more than doubled for ADA charges since FY 2009, with an average of

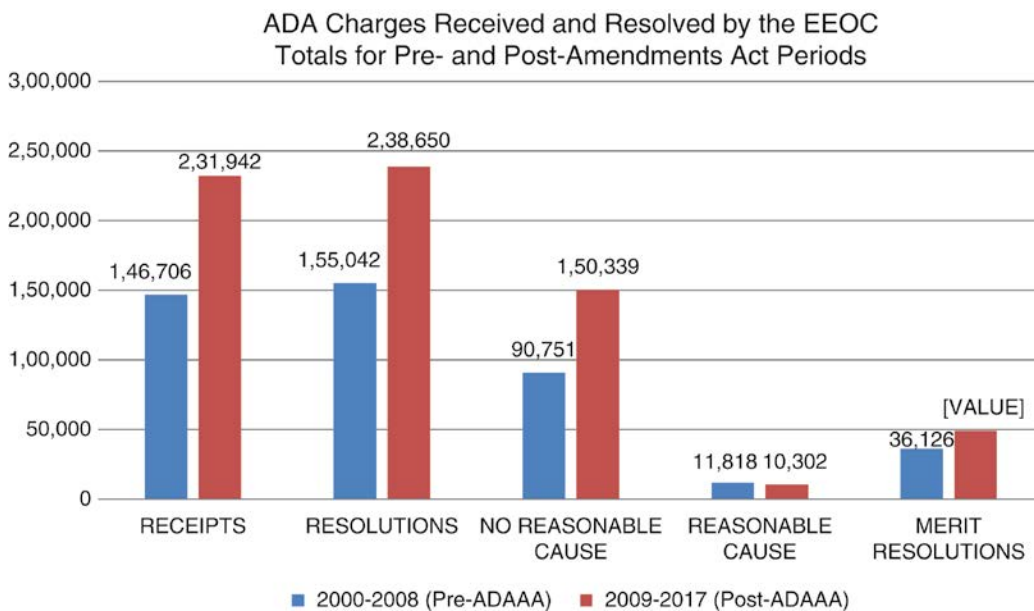
\$50 million in relief per year from FY 2000 to 2008 and jumping to an average of \$105.6 million per year from FY 2009 to 2017.

The number of charges filed by people

with disabilities in most of the 45 disability categories used by the EEOC also increased after the ADAAA.<sup>59</sup> Charges from people with certain disabilities—notably, anxiety disorders, autism, intellectual disabilities, PTSD, and gastrointestinal impairments—increased significantly after the

*The average annual number of ADA charges filed increased from about 16,000 charges a year between FY 2000 and 2008, to 25,700 charges a year between FY 2009 and 2017.*

**CHART 1: ADA Charges Comparing Pre- and Post-ADA Amendment Act Periods**



Data Source: EEOC; Calculations by the researchers.



Amendments Act. Charges filed based on PTSD jumped by 557 percent between the pre- and post-ADAAA periods, with charges based on autism increasing by 497 percent and charges based on anxiety disorders by 224 percent.<sup>60</sup> The cause for these increases is not addressed in this research; however, the impact of U.S. military engagement in Iraq and Afghanistan and greater public awareness of PTSD may account for the increase in PTSD charges. As noted, the EEOC has issued guidance documents on disability-specific topics since 2000, including on PTSD.

While the number of ADA charges increased after the ADAAA, the outcomes of these charges under the EEOC administrative process for people with disabilities has not been as positive. The percentage of merit resolutions—which the EEOC defines as “charges with outcomes favorable to charging parties and/or charges with meritorious allegations”<sup>61</sup>—declined from 23.4 percent of all charges between FY 2000 and 2008, to 20.6 percent from FY 2009 to 2017. Findings of cause, in which the EEOC determines an ADA violation occurred following an investigation, also declined, from 7.6 percent in the nine years before the Amendments Act to 4.3 percent in the nine years after the ADAAA. It is notable that charges under the six other protected classes covered by the EEOC also

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experienced a decline in EEOC merit and cause resolutions in the post-ADAAA period. **NCD recommends the EEOC publish a detailed report of the impact of the ADAAA on the number, disability type, discrimination alleged, and final resolution of ADA charges since passage of the ADAAA.**

The number of charges filed under GINA are the lowest of all the protected classes for which the EEOC has authority.<sup>62</sup> Between FY 2010 and 2017, only 2,093 charges were filed under the statute, representing an average of 262 charges a year. By comparison, 23,351 discrimination charges based on color and 260,802 charges based on race were filed during the same period. Merit resolution of GINA cases were similar to the ADA after the

Amendments Act, with just short of 20 percent of GINA cases resulting in a merit resolution. As a percentage, more GINA charges were closed administratively than under the ADA between FY 2010 and FY 2017, 21.5 percent under GINA on average compared with just over 16 percent under the ADA. Given the few GINA charges filed, monetary benefits totaled \$6.28 million through FY 2017, or about \$0.79 million in GINA monetary damages on average per year. The next lowest total monetary benefits for discrimination was religious discrimination with \$73.30 million followed by discrimination

based on color with a total of \$85.3 million in benefits for persons filing an EEOC charge.

*Promises to Keep* discussed the EEOC's use of mediation and encouraged the Commission to adopt guidelines similar to the ADA Mediation Guidelines and to carefully evaluate the mediation program.<sup>63</sup> The EEOC indicated that it uses the ADA Mediation Guidelines. The Commission evaluates each charge of discrimination to see whether it is appropriate for mediation. Charges determined to be without merit are not eligible for mediation. In most instances, charges that require additional investigation on the merits are eligible for mediation, but the EEOC will not refer to mediation cases that it may investigate as systemic cases or for possible litigation.<sup>64</sup> A charging party may be offered mediation before the EEOC begins any investigation, and either party may request mediation even without an offer from the EEOC.<sup>65</sup> If the charging party is interested in mediation, the EEOC offers mediation to the employer. Because mediation is voluntary, a significant number of employers decline to mediate. If mediation is unsuccessful, the charge is investigated. The Commission uses both internal and external unpaid and paid contract mediators.<sup>66</sup> External mediators are more likely to be used in rural areas. The EEOC reports a high percentage of satisfaction with the EEOC mediation process.

As discussed in Appendix C, researchers for this report conducted three focus groups of people with disabilities in which 12 participants had interacted with the EEOC. The focus group participants, though limited in number, included several who agreed to EEOC mediation, but their employers did not. Based on interviews with three EEOC District Directors, there appears to be significant variation in the willingness of

employers to take part in mediation across the districts.

### ***Competent and Credible Investigative Process and Enforcement Action***

In addition to the Strategic Plan and the SEP, since 1995 the EEOC has used the Priority Charge Handling Procedures (PCHP) to prioritize the Commission's investigative efforts.<sup>67</sup> Under the PCHP, investigators classify each charge received as either an A, B or C. Charges classified as an "A" are charges where it appears more likely than not that discrimination occurred and will receive priority treatment by the EEOC. Charges classified as a "B" include charges that initially appear to have some merit but require additional evidence to determine whether continued investigation is likely to find prohibited discrimination, or where it is not yet possible for the EEOC to make a judgement regarding the merits. Charges classified as "B" are investigated as resources permit. Charges classified as a "C" are those the EEOC has sufficient information to conclude further investigation is not likely to find prohibited discrimination and will be dismissed. Whether the investigator finds the existence of a "prima facie" case is an important factor in categorizing charges—in other words, based on the face of the information provided by the person making the charge, prohibited discrimination appears possible.

People with certain disabilities that affect communication, observation, or information processing could be at a disadvantage under the EEOC classification process. The EEOC investigator on intake uses the initial information received from the person making the charge to assign a charge as an A, B, or C. Such information includes facts the person tells the

investigator, similar circumstances the person knows about at the worksite, and information about other employees or employer practices the person may be aware of or able to access.

A person with a disability that impacts communications or information processing, for example, could be disadvantaged if that person cannot relate essential information to the investigator. According

to an EEOC District Director, investigators are instructed to be aware and take steps to assist if it appears the person's disability might affect the ability to articulate the

situation and the alleged discrimination involves the ADA. There has been no apparent public assessment, however, of whether the PCHP negatively impacts people with disabilities by resulting in a lower classification because of the disability. Charges from

persons with intellectual, cognitive, or other disabilities may result in a C categorization, not based on the merits but because the charging party with a disability has

difficulty in processing information or explaining the discriminatory situation. While EEOC staff are instructed to take steps to assist in ADA cases if assistance appears necessary, this may not occur in non-ADA cases or even recognized in ADA cases without appropriate disability-specific training. **NCD recommends the EEOC evaluate the impact of the Priority Charge Handling Procedures classification process on people with disabilities to determine to what extent**

### **the disability may result in C classifications because of the disability and not on the initial merits.**

In 2017, the EEOC rolled out a "public portal" that allows a person to begin the process of filing a charge of discrimination online.<sup>68</sup> Anyone who believes they have faced discrimination may use the portal to submit an "inquiry" to the EEOC

and schedule an intake interview. The intake interview can occur by phone or in person. Following the intake interview, the person can decide whether to file a formal charge of

discrimination. EEOC staff indicated that the portal allows for more efficient handling of complaints.

The EEOC website contains information on "How to File a Charge," which includes the methods by which a person can find out from

the EEOC how to begin the charge filing process.<sup>69</sup> The webpage emphasizes that the person should use the electronic public portal. The EEOC also has a 1-800 number for

persons to connect to general information, to get answers to basic questions about the EEOC charge process, and for some basic help in filing a charge through the online portal.

While the use of online technology to handle complaints is commendable, there are significant drawbacks for people with certain disabilities that the EEOC should address. The public portal, while Section 508 compliant, does not clearly state how a person may request an accommodation

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*People with certain disabilities that affect communication, observation, or information processing could be at a disadvantage under the EEOC classification process.*

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*The [EEOC's] public portal, while Section 508 compliant, does not clearly state how a person may request an accommodation necessary to complete an inquiry.*

necessary to complete an inquiry. People with disabilities who have difficulty in the use of technology may be deterred from contacting the EEOC to file a charge. Though the portal contains an email address to use to report technical problems and a link to a statement about the Rehabilitation Act, there is no clear indication of how a person with a disability may request other accommodations needed to file a charge. Likewise, a person with a disability whose symptoms may cause frustration, confusion, or attention difficulties may drop off before answering the questions on the portal given the lack of clear and simple information on how to request an accommodation or how to file a charge through other means. Similarly, though a captioned video describing the EEOC charge process is available, there is no comparable video that uses American Sign Language.

Between FY 2003 and 2017, according to EEOC provided data, half of all people who made an inquiry with the EEOC about potential employment discrimination did not file a charge. That number has dropped to between 42 and 45 percent in more recent years. Data is not available about which act the person making the inquiry of the EEOC believed had been violated because a charge is not filed in inquiry-only situations.

Finally, during the small focus discussion groups, while one participant was pleased that an EEOC staff person filled out the form because the person's disability made writing difficult, a more common complaint among participants was that the private sector charge filing process was difficult to understand and navigate. **NCD recommends the EEOC revise the public portal to clearly identify how a person with a disability can request a reasonable**

**accommodation to file a charge, and clearly state the other options available to begin the charge filing process. This should include a clear explanation of the option to file a self-created charge of discrimination, especially in cases in which the time to file may soon expire.**<sup>70</sup>

**NCD recommends the EEOC create and post on its website videos in American Sign Language (ASL) about the EEOC charge filing, mediation, and investigation processes and important guidance on all laws enforced by the EEOC.**<sup>71</sup>

The EEOC at present maintains working relationships with 92 state and local investigative agencies, which are known as Fair Employment Practice Agencies (FEPAs).<sup>72</sup> Through work-sharing agreements between the EEOC and the FEPAs, a charge filed by a person with a disability with one agency is normally dually filed with the other. Typically, the agency that receives the charge first, either the EEOC or the FEPA, will conduct the investigation. Following a FEPA investigation, the charging party may request the EEOC conduct a "substantial weight review" of the FEPA decision. In addition, the EEOC conducts random reviews of FEPA decisions. EEOC staff report approximately 23 percent of all FEPA charges are reviewed when considering both the individual party requests and the EEOC's random reviews. A FEPA error rate greater than 5 percent would result in EEOC action to seek to improve the work of the FEPA.<sup>73</sup> EEOC staff report that no FEPA has ever exceeded the 5 percent error rate. If a FEPA ever crossed the 5 percent error rate, the Commission would work to improve the FEPA performance and not terminate the work-sharing agreement.

*Promises to Keep* recommended the EEOC better explain the role of the FEPAs and offer more support, oversight, and training.<sup>74</sup> The EEOC explains the role of the FEPAs and provides an explanation of dual filing.<sup>75</sup> Researchers found that the language used to explain the role of the FEPA is at a 13.7 grade level under the Flesch-Kincaid Grade-Level scale.<sup>76</sup> People with intellectual, cognitive, or certain learning disabilities might have difficulty understanding the role of the FEPA. The EEOC description does not clearly state that the FEPA will likely investigate the charge if filed first with the FEPA, using instead a more bureaucratic term that the FEPA will “process the charge.” An assessment of FEPA websites also

suggests the EEOC/FEPA relationship is not clearly explained, if at all. A random review of 10 percent of the FEPA websites revealed little or no mention of the role of the EEOC.<sup>77</sup> Only three of

12 websites reviewed mention the work-sharing role between the EEOC and the FEPA. Two of the websites reviewed reference, but are not clear, about the exact role of the EEOC. The remaining six websites reviewed had no indication of any working interaction between the EEOC and the FEPA. **NCD reiterates the recommendation from *Promises to Keep* that the EEOC improve the public understanding of the relationship between the EEOC and the FEPAs by requiring appropriate explanations on EEOC and the FEPA webpages and fact sheets. The EEOC should improve and simplify its explanation of the role of the FEPAs by following the requirements of the Plain Writing Act.**

In regard to FEPA training and support, the EEOC explained that FEPA staff are invited to EEOC investigator training sessions and webinars, and larger FEPAs often participate in the EEOC’s multiday intermediate investigator training. The exact number of FEPA staff who attend these trainings is unknown. While training opportunities on the ADA for FEPA staff may have increased since 2000, there is no indication of the actual number of FEPA staff who participated in ADA training.

Finally, it should be noted that a federal jury found that a FEPA, in its capacity as an employer, had discriminated against an employee with a disability who requested an accommodation.

The FEPA asserted, among other arguments rejected by the federal court, that Section 504 of the Rehabilitation Act did not require the provision of an accommodation of a climate-controlled office

because the employee’s condition would eventually require her to stop working.<sup>78</sup> Though no broad conclusions may be drawn about all FEPAs based on a single case, it is disturbing that a state entity with a relationship with the EEOC to enforce disability civil rights would take such a position regarding its own employment of a person with a disability. **NCD recommends the EEOC track the training completed by FEPA staff on the ADA and other disability civil rights laws as part of oversight of the quality of the work of a FEPA, and should low participation be found, develop methods to encourage FEPA staff participation in such trainings.**

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*Promises to Keep* encouraged the EEOC to continue to enhance a team approach on appropriate ADA investigations and litigation.<sup>79</sup> According to the EEOC, the Commission is making progress toward creating a “national law firm” model.<sup>80</sup> Under this model, the Offices of General Counsel and Field Programs meet regularly to discuss pending investigations, lead systemic investigators exist in every district, and a national systemic investigations manager is located at EEOC headquarters.<sup>81</sup> The EEOC told the researchers that the national database allows investigators to check on issues that might have arisen in charges filed in other districts, improving the chance to identify systemic issues.

The EEOC indicated that the quality of intake, investigations, and the conciliation process is overseen first by a supervisor who is responsible for six to eight investigators. EEOC headquarters staff also conduct a

quality review of about 1,500 to 2,000 charges resolved each year from across the districts using a quality criterion and may conduct on-site technical assistance visits. Problems uncovered are discussed with the district director. The Commission issued a *Quality Practices for Effective Investigations and Conciliation* in September 2015.<sup>82</sup> The four-page *Quality Practices* document is very brief and extremely general, stating that investigators should utilize “investigative tools,” attempt to interview the

charging party, and may request statements from the charging party or the employer.<sup>83</sup> According to the document, investigator analysis and conclusions should be supported by evidence and reflect a “reasonable application of the law and current Commission policy.”<sup>84</sup>

Unlike other federal agencies such as the DOL Wage and Hour Division’s Field Operations Handbook, the Office of Federal Contract Compliance Programs’ Compliance Manual, and the Social Security Administration’s Program Operations Manual, there is no current EEOC manual that covers the application of all laws enforced by the Commission or that provides

investigative guidance to investigators. The EEOC has an older compliance manual that addresses procedural matters that may be referred to during an ADA investigation, but investigators mainly rely on EEOC facts sheets, Q&As, and other documents created by the OLC to determine

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*[T]here is no current EEOC manual that covers the application of all laws enforced by the Commission or that provides investigative guidance to investigators. . . .*

*[I]nvestigators mainly rely on EEOC facts sheets, Q&As, and other documents created by the OLC to determine ADA requirements.*

ADA requirements. **NCD recommends the EEOC create, with input from the disability community, a specific methodology to assess the quality of investigations of ADA charges, to include (1) intake interviews of persons with disabilities, (2) requests made for documentation of the discriminatory acts alleged, (3) whether overbroad or unnecessary requests were made for medical documentation based on the standards established through the ADA, (4) the**

**reasonableness of time provided to respond to requests, (5) the quality of the review of the documentation and statements, and (6) the application of the facts to the current state of law under the ADA.**

Consistent with other federal enforcement agencies, EEOC investigators are cross trained on all laws enforced by the Commission. Disability discrimination cases, however, may contain nuances and complexities based on the charging person’s disability. This is especially the case in requests for reasonable accommodations. While NCD recognizes the cost efficiency of cross-trained staff, a specific understanding of disability issues, for example, understanding important differences between various mental health disabilities, intellectual disabilities, developmental disabilities, or communications issues for the Deaf and Hard of Hearing and the blind and visually impaired, can impact the outcome of an ADA investigation. **NCD recommends the EEOC develop investigators who are specialists in disability issues and devoted specifically to investigate ADA charges.**

***Timely Resolution of Complaints***

The EEOC seeks to reduce what it terms the charge “inventory” as an ongoing goal. Before the PCHP was adopted in FY 1995, the policy of the Commission was to fully investigate every charge.<sup>85</sup> Use of PCHP reduced the inventory

from 112,000 charges in FY 1995 to 29,000 charges by FY 2002.<sup>86</sup> The EEOC inventory has also increased since the low point in FY 2002. The most recent peak occurred in FY 2010 when the end-of-year inventory was 86,000, dropping steadily to 61,621 charges at the end of FY 2017. While at its lowest point in 10 years, the inventory is still more than double the low point in FY 2002.

The average time to resolve a complaint in FY 2002 was 160 days, but this has steadily increased.<sup>87</sup> In FY 2016, with a reduced staff, the average time to resolve complaints increased to more than 300 days, slightly improving to 295

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*In FY 2016, with a reduced staff, the average time to resolve complaints increased to more than 300 days, slightly improving to 295 days in FY 2017. Since FY 2000, on average it takes 241 days from receipt of a complaint to resolution.*

days in FY 2017. Since FY 2000, on average it takes 241 days from receipt of a complaint to resolution.<sup>88</sup> The increased average time to resolve a complaint reported is echoed in several comments by participants in the

focus discussion groups about investigations that dragged on for several years, waiting one to two years before case closure. One participant believed the investigator re-started the investigation from the beginning over the course of several years, and several participants were told by investigators they had too many cases. One focus group participant reported, however, that the EEOC issued a reasonable cause finding within about six months. **NCD recommends the EEOC prioritize the reduction of the charge inventory and processing times to FY 2002 levels through an increase in staff levels.**

## **Communication with Complainants and the Community**

Independently assessing the communications of the EEOC with people with disabilities and complainants on a generalized national basis is difficult given the lack of data and measurable outcomes. EEOC staff reported that each district seeks out substantial partners, which include at least one disability organization.

A number of participants from the three focus groups complained about the lack of communication after contacting the EEOC. The complaints ranged from a participant who said she initially went to her local EEOC office in March 2015, but her charge was not actually filed until the fall of that year, to others who reported long time gaps in communication with the investigator. One participant did appreciate the new online portal, which allowed her to learn that an investigator had been assigned to her complaint. **NCD recommends the EEOC improve communications with people who file a charge by requiring that investigators respond to inquiries made by charging parties within 30 days of the inquiry.**

### **Strategic Litigation**

The number of EEOC cases litigated under the ADA has significantly increased since *Promises to Keep*, primarily due to the ADAAA. Under the ADAAA, Congress clarified the ADA definition of “disability” to reverse restrictive interpretations by the U.S. Supreme Court and other federal courts of “who is a qualified person with a

disability covered under the ADA.”<sup>89</sup> As noted in *Promises to Keep*,<sup>90</sup> prior to the Amendments Act the General Counsel would request approval of the Commissioners before filing an ADA case given the difficulties under the ADA definition of “disability.” Approval by the Commissioners is no longer necessary except as required according to general EEOC policy.<sup>91</sup> Though some disability “coverage” issues remain, the legal issues have shifted more toward what constitutes employment discrimination under the ADA.

Between FY 2002 and 2008, ADA cases represented on average 12.6 percent of all merit cases the EEOC filed in federal court, with an average of 44 ADA cases per year.<sup>92</sup> ADA federal

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***ADA federal cases filed by the EEOC increased to 33 percent of all merit cases per year from FY 2009 to 2016, with an average of 54 ADA cases per year.***

cases filed by the EEOC increased to 33 percent of all merit cases per year from FY 2009 to 2016, with an average of 54 ADA cases per year. Court monetary awards for EEOC-litigated ADA

cases, as would be expected, rose as well from an average of \$4.58 million per year between FY 2002 and 2008, to \$10.14 million between FY 2009 and 2016.

EEOC litigation since the ADAAA has included different substantive legal issues. Under the SEP, the EEOC increased its focus on litigating cases that involve systemic issues.<sup>93</sup> Major areas of litigation focus have been employer policies on leave or that require return to work with no restrictions and the right of assignment to a vacant position as a reasonable accommodation. The EEOC also brought several cases on what are the “essential functions” of a job.



The EEOC was highly successful in *EEOC v. Hill Country Farms d/b/a as Henry's Turkey Service* for ADA violations of discriminatory pay and hostile working conditions experienced by the men with intellectual disabilities exploited in Iowa.<sup>94</sup> The EEOC obtained a back-pay award of \$1.3 million for work the men performed from 2007 to 2009, and prevailed in a discriminatory treatment allegation when a jury returned a verdict of \$240 million in punitive and compensatory damages for the workers—the highest ever achieved by the EEOC in a jury trial.<sup>95</sup> The award was significantly reduced by the court because of a statutory cap on such damages.<sup>96</sup>

The Commission achieved a significant victory on the issue of reassignment to a vacant position in *EEOC v. United Airlines*<sup>97</sup> when the U.S. Seventh Circuit Court of Appeals overruled a prior decision that had taken a more restrictive view of reassignment.<sup>98</sup> In the *United Airlines* case, the Seventh Circuit found that the ADA mandates the assignment of an employee with a disability to a vacant position for which the employee is qualified as a reasonable accommodation, provided the assignment is ordinarily reasonable in most cases and would not present an undue hardship in the particular case at hand. Other EEOC litigation outcomes on reassignment cases have not been successful. In *EEOC v. St. Joseph's Hospital*, the U.S. Eleventh Circuit Court of Appeals concluded that “the ADA does not require reassignment without competition for, or preferential treatment of, the disabled.”<sup>99</sup>

The outcomes in “essential job function” litigation by the EEOC in the U.S. Courts of Appeal has been similarly mixed. The EEOC failed in *EEOC v. The Picture People, Inc.*, which involved deciding whether the Deaf and

Hard of Hearing could perform the essential functions of a job as a “performer” at a store.<sup>100</sup> The EEOC succeeded in *EEOC v. AutoZone, Inc.*, in which an employer unsuccessfully contended that mopping up the store at the end of the day was an essential function of the job at issue.<sup>101</sup> In *EEOC v. LHC Group, Inc.*, the Commission proved that driving was not an essential job function for a nurse team leader for a home health agency because, despite the job description and the assertion of the employer, the appropriate test was whether the position actually required driving, and the evidence showed a team leader rarely needed to drive.<sup>102</sup>

The EEOC was unsuccessful, however, in two cases on whether heavy lifting was an essential job function. In *EEOC v. Womble Carlyle, Sandridge & Rice, LLP*, the court ruled against the EEOC and found that heavy lifting was an essential function for an office support worker with a disability assigned many tasks in a large law firm office who could be assigned to work alone on weekends.<sup>103</sup> In another case against AutoZone, the U.S. Seventh Circuit Court of Appeals refused to reverse a verdict against the EEOC, finding that the district court did not commit an error when it failed to instruct the jury about the use of the “team concept”—wherein team members perform tasks according to their capacities and abilities.<sup>104</sup>

Telework as a reasonable accommodation suffered a legal setback for people with disabilities in a decision by the U.S. Sixth Circuit Court of Appeals in *EEOC v. Ford Motor Company*.<sup>105</sup> The Commission argued that a terminated employee with a disability could have performed her job effectively through telework for up to four days a week as an accommodation.

The majority of the entire Sixth Circuit, however, held that regular and predictable on-site attendance was essential to what the court termed the employee’s “highly interactive job.”<sup>106</sup>

The EEOC litigated individual cases involving blanket exclusionary policies. For example, in *EEOC v. Old Dominion Freight Line, Inc.*, the EEOC prevailed on the issue of an employer’s refusal to reinstate or rehire truck drivers who were diagnosed with alcoholism but who had completed an alcohol treatment program.<sup>107</sup> In a case dealing with the ADA and the U.S. Constitution, in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, the U.S. Supreme Court ruled against the EEOC and recognized the existence of a “ministerial exception” under the ADA, grounded in the First Amendment that precludes application of nondiscrimination laws to claims concerning the employment relationship between a religious institution and its ministers.<sup>108</sup>

The majority of EEOC litigation settles, and the Commission stresses targeted equitable relief in addition to monetary relief in its ADA settlement agreements. Two examples of targeted equitable relief from FY 2016 highlight this effort. In one case, the EEOC alleged that an employer failed to accommodate employees who requested to sit during their shifts. Through a conciliation agreement, the employer agreed to pay \$5.05 million to nine parties, 77 known class members and additional unidentified class members, to restructure its accommodation process and provide training that would benefit more than 40,000 employees.<sup>109</sup> In the second 2016 case,

the EEOC resolved a Commissioner’s charge alleging disability discrimination against a large assessment test provider when the company agreed to make all of its online applicant assessment tests accessible to vision-impaired applicants via screen reading software, impacting thousands of assessments.<sup>110</sup>

The EEOC’s first GINA suit was filed in 2013 against Fabricut, Inc. for violations of GINA—when it asked a woman for her family medical history in a post-offer medical exam—and the ADA—when it refused to hire her because it regarded her as having carpal tunnel syndrome. The company settled for \$50,000, modified its policies, and provided antidiscrimination training

to its employees. The EEOC has filed only a handful of additional GINA cases since, given the small number of GINA charges filed with the Commission.

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interpretation of the ADA, the Commission submits friend of the court (*amicus*) briefs in many individual ADA cases in which the EEOC is not the plaintiff. These briefs can assist a court in interpreting the ADA or the EEOC regulations. According to the OGC, the EEOC monitors federal cases that are appealed by either the plaintiff or the defendant to a U.S. Court of Appeals. This includes plaintiffs who are not represented by an attorney. OGC noted there are still a number of cases in which the district court wrongly applies pre-ADAAA case law, especially when the plaintiff is not represented by an attorney.

The EEOC can submit a friend of the court brief in a case being considered by a U.S. Court

of Appeals without court approval. In determining whether to file a friend of the court brief, the EEOC looks for clear legal error by the lower district court and in which the EEOC can be of assistance to the court. The Commissioners must approve the filing of friend of the court briefs. The EEOC's friend of the court activity has been successful in some cases with U.S. Circuit Courts agreeing to a broad interpretation of the definition of "disability" as intended by the ADAAA. In *Barlia v. MWI Veterinary Supply*,<sup>111</sup> the Sixth Circuit, for example, agreed with the EEOC and reversed the lower district court on the definition of "disability" (though agreeing on the merits against the plaintiff).

### **Interagency Collaboration and Coordination**

*Promises to Keep* identified interagency collaboration and coordination as a critical factor for enforcement.<sup>112</sup>

In 2015, the EEOC entered into memoranda of understandings (MOU) with DOJ's Civil Rights Division, in 2017 with DOL's Wage and Hour Division (WHD), and in 2011 updated an MOU with DOL's Office of Federal Contract Compliance Programs (OFCCP).

EEOC and DOJ share enforcement authority for public sector employers under the ADA and GINA.<sup>113</sup> EEOC has authority to investigate and mediate discrimination charges against public sector employers, and as with private employers, the EEOC seeks to remedy violations by public employers through conciliation. If the EEOC conciliation fails, the matter is referred to DOJ,

which has sole authority, and discretion, on whether to file suit against a public employer.

The EEOC and the DOJ Civil Rights Division MOU authorizes collaboration between the agencies on "the investigation, resolution, and litigation of charges; development of policy guidance; engaging in outreach and public education; training of each agency's staff; and sharing of resources, as may be appropriate."<sup>114</sup> The MOU also addresses information sharing, points of contact, disclosure of information to third parties, and confidentiality; notification and consultation procedures at various stages; and establishing field cooperation procedures. The EEOC reports that the district offices

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and the DOJ now have local liaisons, and DOJ attorneys are involved earlier in EEOC investigations and conciliations to determine whether it may be interested in litigating the case. This early involvement has helped reduce the time

for DOJ to decide whether to litigate, because both agencies understand the charge and the investigative file. The MOU has provided a formal mechanism to achieve tighter coordination and interagency cooperation in enforcement of employment laws. The EEOC also partners with DOJ in submitting briefs such as in *Dagher v. Washington Metropolitan Area Transportation Administration* involving the definition of "disability."<sup>115</sup>

The MOU between EEOC and WHD covers a number of federal labor laws enforced by WHD. With the convergence of employment rights

protections and enforcement by EEOC and WHD, the MOU is intended to “maximize and improve the enforcement of the federal laws administered [by the agencies].”<sup>116</sup> The MOU contains agreements between the agencies similar to the MOU with DOJ such as information sharing, agency points of contact, confidentiality, and disclosure of information to third parties.

The MOU between WHD and EEOC emphasizes development of ways to efficiently systematize information and data sharing, particularly regarding unlawful compensation practices, especially unlawful denial of minimum wages or overtime pay; discrimination in compensation; working and living conditions of employees; unlawful denial of family and medical leave and leave-related discrimination based on disability and other grounds; employment opportunities for people with disabilities; and the identification and investigation of complex employment structures. Other areas of emphasis include conducting coordinated investigations and training and outreach to each agency’s staff; increasing public education and sharing or co-developing training materials and programs for a greater understanding of the laws enforced by each agency; and holding periodic meetings and establishing routine communication to share information about enforcement priorities and other employment trends. The MOU between EEOC and WHD has been in place for under two

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*Staff report some jurisdictional competition between OFCCP and EEOC, as well as different procedures, such as those concerning the confidentiality of settlement agreements . . .*

years, and there is little information about the impact of the agreement.

In 1992, OFCCP and the EEOC developed parallel regulations for handling individual complaints that allege violations of both Section 503 of the Rehabilitation Act and the ADA.<sup>117</sup> The regulations address exchange of information between the agencies and confidentiality requirements, but also go into detail about

the processing and investigation of individual ADA and Section 503 complaints. The procedures are helpful to people with disabilities, as they ensure timely

filing of a complaint or charge regardless of whether the person files first with the EEOC or OFCCP.

In addition, since 1970, the EEOC and OFCCP have maintained an MOU, last updated in 2011 to promote interagency coordination and efficiency

and to eliminate conflict and duplication.<sup>118</sup> Similar to the other MOUs, the EEOC and OFCCP address procedures to share information to support their enforcement mandates; the disclosure of information to third parties;

confidentiality, notification, and consultation during compliance activities; and the processing and investigation of dually filed complaints.

Staff report some jurisdictional competition between OFCCP and EEOC, as well as different procedures, such as those concerning the confidentiality of settlement agreements, which in the past required negotiations on how to

proceed in cases of joint investigations. The agencies seek to deal with specific issues of joint responsibility and investigations of federal contractors through biannual meetings at the field and headquarters levels of the MOU-developed Compliance Coordination Committees.

**NCD recommends that the EEOC and OFCCP increase the required frequency of the meetings of the Compliance Coordination Committees to ensure early resolution of jurisdictional issues and the identification of systemic problems by federal contractors.**

### ***Training and Technical Assistance***

*Promises to Keep* made several recommendations

concerning EEOC training and technical assistance, including more training to the federal judiciary and to consumers, as well as additional training and guidance to investigators on U.S. Supreme Court decisions.<sup>119</sup> EEOC training

on the ADA and the Rehabilitation Act is provided by the OLC, outreach and education coordinators in the EEOC field offices, and through outreach and education staff at the Office of Federal Operations. There was no information available to assess the quality of such trainings.

The Commission offers a no-cost outreach program in which “EEOC representatives are available on a limited basis . . . to make presentations and participate in meetings, conferences and seminars with employee and employer groups, professional associations, students, non-profit entities, community organizations and other members of the

general public.”<sup>120</sup> The EEOC conducts about 30 Technical Assistance Program Seminars a year under a provision that allows the agency to provide fee-based trainings through the EEOC Training Institute.<sup>121</sup> The EEOC also holds an annual Examining Conflicts in Employment Laws national conference for equal employment opportunity managers and professionals. The EEOC reported staff are encouraged to add visits to partners affiliated with employees when traveling to conduct fee-based trainings.

The OGC interacts more with the federal courts, but stated it has little ability to control what trainings the federal judiciary, as a separate branch of government, will provide to judges.

While the General Counsel, and on a few occasions attorneys from OLC, have presented to various U.S. Court of Appeal Circuit trainings, the judges decide whom to invite to such trainings. The EEOC believes the filing of friend of the court

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briefs are a very good way to inform federal judges about the ADA.

The Commission’s FY 2012 and the current Strategic Plan have sought to ensure that “sub-regulatory guidance and documents are reviewed and that, where necessary they are updated and accompanied by plain language texts.”<sup>122</sup> Based on a test of several EEOC facts sheets and Q&As using the Flesch-Kincaid Grade-Level scale, the agency resource documents are still written at a post-high school reading level. A few participants in the focus discussion groups had, however, used EEOC materials from the website and in general found the materials helpful.

**NCD recommends the EEOC develop ADA fact sheets and guidance documents for the general public in simpler language that takes into account persons with various disabilities as stated in the Commission’s Strategic Plan and in accordance with the Plain Writing Act. The EEOC should continue to routinely create detailed guidance documents about the ADA that benefit employers, advocates, and the courts.**

### ***Adequacy of Agency Resources***

Adequate funding and staffing of enforcement agencies is a key requirement for enforcement of disability civil rights laws. Since *Promises to Keep*, the EEOC budget in constant dollars dropped by 8.85 percent (see Table A in Appendix A). Of greater concern, EEOC staff levels have declined rapidly since 2000, dropping 27 percent from 2,852 actual full-time equivalent (FTE) staff in FY 2000, to 2,082 actual FTEs in FY 2017. The number of actual FTEs was also below the approved FTE ceiling in 17 out of the past 18 fiscal years (see Table B in Appendix A). According to EEOC data, about 71 percent of the EEOC budget on average is for compensation and benefits.

Staffing within the OGC similarly declined, with field attorneys dropping from 226 in FY 2000 to 173 in FY 2016, a decline of 23 percent. OGC headquarters staff also declined, from 89 FTEs in FY 2000 to 48 in FY 2015, a decline of 46 percent. The OGC litigation

### **Declining Staffing at the EEOC**

EEOC staff levels have declined rapidly since 2000, dropping 27 percent from 2,852 actual full-time equivalent (FTE) staff in FY 2000, to 2,082 actual FTEs in FY 2017.

Staffing within the OGC similarly declined, with field attorneys dropping from 226 in FY 2000 to 173 in FY 2016, a decline of 23 percent.

budget has generally made up only about 1 percent of the entire EEOC budget, or from \$4.9 million in FY 2010 to a total of \$3.77 million in FY 2016.<sup>123</sup>

The EEOC indicated that a number of factors impact the ability to hire and achieve staffing levels. In addition to differences between the requested and enacted appropriations, the EEOC noted external factors that have impacted hiring to include FTE targets not being reduced when congressional appropriations are lower than requested, federal hiring freezes, mandated and unfunded pay increases during the first part of the century, rescissions, and the FY 2013 sequestration. **NCD recommends that Congress and the President eliminate budget and hiring barriers, such as hiring freezes and unfunded mandatory pay increases, which prevent the EEOC from maintaining necessary staff levels.**

## Chapter 2: U.S. Department of Labor

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The Department of Labor (DOL) is responsible for the enforcement and oversight of a number of programs that impact the employment and rights of people with disabilities. This chapter considers the efforts of DOL's Employment and Training

Administration (ETA), Office of Disability Employment Policy (ODEP), Office of Federal Contract Compliance Programs (OFCCP), Office of the Solicitor (SOL), and the Wage and Hour Division (WHD).

### **Based upon the analysis contained in this chapter, NCD recommends that:**

- ETA expand the Disability Employment Initiative (DEI) program to include a greater number of DEI projects for people with significant disabilities.
- ETA develop an accessibility grants program to plan, fund, and administer better programmatic, physical, and electronic accessibility of American Job Centers in accordance of Section 188 of the Workforce Innovation and Opportunity Act (WIOA).
- ETA provide guidance and technical assistance to assist American Job Centers achieve better accessibility, including guidance on serving people with communication disabilities (sign language interpreters, etc.).
- ETA create a strategic plan to develop and implement evidence-based policies, practices, and tools to foster the inclusion of people with disabilities in 21st-century jobs with specific timelines and benchmarks.
- ODEP create and oversee a working group of federal agencies to infuse promising practices into all federal employment programs in order to increase disability employment.
- ODEP revisit prior recommendations made to other entities to evaluate the extent to which ODEP recommendations were adopted and follow up to discuss nonimplemented recommendations and to provide assistance.

*(continued)*

**Based upon the analysis contained in this chapter, NCD recommends that: *continued***

- ODEP continue to focus on strategies that support changing workplaces to allow all people with disabilities, including those with significant long-term disabilities, to enter or remain in the workforce, which includes the improvement of return-to-work/stay-at-work programs.
- OFCCP better ensure materials and documents are written in simple language.
- OFCCP ensure its primary focus in the development of all regulations, sub-regulatory guidance, and other policy materials pertaining to Section 503 and the Vietnam Era Veterans Readjustment Assistance Act is on the advancement of employment opportunities for people with disabilities.
- OFCCP modify its compliance review procedures for Section 503 of the Rehabilitation Act as specifically detailed in this chapter.
- OFCCP develop new procedures outside of the compliance review process, such as a random request for the establishment of written contractor affirmative action programs, to better ensure compliance with the Section 503 written affirmative action requirements.
- OFCCP hire and train a sufficient number of compliance officers in areas where federal contractors are concentrated in order to increase the number of compliance reviews.
- WHD amend the Fair Labor Standards Act Section 14(c) certificate application form to collect information on the total number of employees who earn a subminimum wage and state that 14(c) employees have rights under the ADA.
- WHD create technical guidance for 14(c) certificate holders that being “disabled for the work” on one task does not establish a person is “disabled for the work” on other tasks.
- WHD systematically track how many 14(c) certificates have expired and the reasons for the expiration.
- WHD use enforcement authority to determine the extent to which employers who do not renew a 14(c) certificate continue to pay a subminimum wage.
- WHD produce additional training materials targeted for use by community rehabilitation program staff.
- WHD undertake a focused strategic enforcement effort to determine the extent school work experience programs comply with Section 511 of WIOA.
- WHD track the extent to which community rehabilitation programs participate in the AbilityOne program, the number of legal violations, and the number of referrals made by WHD to the AbilityOne program for enforcement.

*(continued)*



**Based upon the analysis contained in this chapter, NCD recommends that: *continued***

- WHD prioritize the use of directed enforcement investigations to ensure effective enforcement and deterrence.
- WHD reallocate its resources to expand Section 14(c) oversight through random sampling of 14(c) certificate holders to determine the prevalence of violations of federal wage and hour laws and to determine factors likely to lead to violations.
- WHD create an online form to better enable an employee with a disability to request a hearing by an Administrative Law Judge to review the payment of subminimum wages.
- WHD conduct outreach to employees with disabilities paid a Section 14(c) subminimum wage about their rights and the process to petition for review of their wages and modify all relevant outreach materials and posters to clearly state those rights.
- WHD take steps to increase the percentage of investigators trained for, and solely dedicated to, the enforcement of Section 14(c).
- WHD undertake a systemic look at the reasons for the increase in Family and Medical Leave Act violations, with an emphasis on whether an increase in agency-initiated investigations is warranted.

**NCD recommends that Congress and the President:**

- Require federal agencies responsible for oversight of federal employment programs to consult with ODEP to incorporate promising disability practices and by doing so break down silos that exist between federal agencies.
- Ensure ODEP funding is flexible and focused on contracts with, and grants to, experts in the various fields affecting disability employment.

The remainder of this chapter considers each of the DOL agencies.

## Employment and Training Administration (ETA)

### Overview of the ETA

DOL's Employment and Training Administration seeks to contribute to a more efficient functioning of the U.S. labor market by providing job training, employment, labor market information, and income maintenance services primarily through state and local workforce development systems.<sup>124</sup> Much of ETA's work is carried out through grants and contracts.

The broad mission of ETA is inclusive of people with disabilities. According to ETA, approximately 290,000 individuals identified themselves as having a disability in 2016 when they received services under ETA-administered WIOA Title I programs for adults, dislocated workers, and youth. ETA also administers Title III of WIOA, the Wagner-Peyser Act Employment Service program, and has direct oversight of approximately 2,400 American Job Centers (AJCs), which provide workforce services to job seekers, including persons with disabilities. ETA further administers the Work Opportunity Tax Credit, not assessed in this report, which provides tax credits for employers to hire Supplemental Security Income recipients, among several other targeted groups.

### Regulatory, Sub-Regulatory, and Policy Guidance

ETA publishes regulations and monitors AJCs for compliance with laws that require that AJCs

be accessible both physically and pragmatically. While State Workforce Development Boards—which develop AJC certification criteria—have some flexibility in establishing the criteria, ETA emphasizes that AJC accessibility, at a minimum, must comply with the equal opportunity provisions of Section 188 of WIOA.<sup>125</sup>

ETA reports that it maximizes compliance with Section 188 through grant monitoring by its six regional offices. Monitoring can include on-site visits and desk reviews, and ETA checks that grantees have appropriate policies and procedures necessary to comply with federal disability rights laws. ETA has developed several

technical assistance resources and webpages for AJC and other WIOA covered entities; however, it is not clear if ETA has a strategy to disseminate and target such information to all AJCs.

#### **NCD recommends**

**that ETA develop an accessibility grants programs to plan, fund, and strategically focus upon better programmatic, physical, and electronic accessibility of AJCs, pursuant to the requirements of Section 188 of WIOA.**

### Proactive and Reactive Strategies

While ETA recognizes the importance of being innovative to meet the principles of WIOA, as well as evolve to meet new technologies and emerging markets, ETA is not clear about its strategic plan for the employment of people with disabilities in 21st-century jobs. ETA has yet to report concrete progress in implementing WIOA in response to new and rapidly emerging

technologies and labor market sectors, although the ETA has stated its commitment to exploring the dynamics of this area and to make its resources available. **NCD recommends ETA develop a strategic plan for developing and implementing evidence-based policies, practices, and tools to foster the inclusion of people with disabilities**

**in 21st-century jobs with specific timelines and benchmarks.**

### ***Training and Technical Assistance***

ETA provided training on WIOA and its regulations, including on AJC accessibility and the Section 188 regulations during in-person WIOA training sessions in 2016 and 2017 and through guidance and online technical assistance. Materials from these training sessions, as well as a calendar of upcoming events relevant to WIOA, are available online.

ETA's State Apprenticeship Expansion grants and extensive technical assistance efforts are designed to allow states to expand the use and reach of apprenticeship.<sup>126</sup> ETA has not provided quantitative data reflecting the number of people with disabilities who currently participate in such apprenticeship programs. ETA is updating its parameters for data collection and anticipates disability status will be a part of the data collection beginning January 2019.

According to the agency, over the past several years, ETA has worked to improve and

align services in AJCs, including for persons with disabilities. DOL awarded total grants of approximately \$139 million to 55 projects in 30 states over eight years through the Disability Employment Initiative (DEI), which aims to strengthen the capacity of the workforce investment system to improve employment

outcomes for people with disabilities. ETA administers DEI through joint funding with ODEP.

More recent DEI grants incorporated a career-pathways focus, including apprenticeship, to align

with the goals and objectives of WIOA and to close the skills gap. There are currently 18 active DEI projects in 15 states and one tribal nation, of which eight are focused on adults, seven are focused on youth, and three are focused on

persons with significant disabilities. **NCD recommends that ETA expand the DEI grants program to include a greater number of DEI projects for individuals with significant disabilities nationwide.**

ETA reports it seeks to improve AJC services by encouraging states and local areas to provide such services through customer-centered design. To date, ETA has sponsored four rounds of a free online, seven-week-long, customer-centered design class in which ETA challenges teams to design new ways to be customer focused. More recent design challenges, according to ETA, that concerned customers with disabilities focused on examining universal design principles to maximize inclusive service delivery by the

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AJCs. ETA, however, did not report the number of AJCs that have participated in these design challenges, and as recently as January 2017 DOL found that “[a]lmost two-thirds (63 percent) of AJCs were ‘not fully accessible’ to people with disabilities.”<sup>127</sup> **NCD recommends that ETA provide guidance and technical assistance to help American Job Centers in achieving better accessibility, including guidance on serving individuals with communication disabilities (sign language interpreters, etc.).**

### **Interagency Collaboration and Coordination**

ETA partners with the Civil Rights Center (CRC) to develop, administer, and enforce DOL civil rights requirements. ETA, CRC, and ODEP have jointly developed a set of best practices to implement Section 188 of WIOA, which prohibits discrimination in the provision of services to people with disabilities.

ETA uses a common set of performance measures for all employment and training programs focused on employment outcomes, also used by the Department of Education.<sup>128</sup> ETA requires that grantees report on individual characteristics of program participants, including eight disability categories to be used by all program partners.<sup>129</sup> States are still transitioning to the new reporting requirement, so results for the disability categories are not yet available. Common disability categories across the program partners, however, will enable DOL agencies to evaluate the impact of employment and training programs on different populations of people with disabilities.

## **Office of Disability Employment Policy (ODEP)**

### **Overview of ODEP**

The Office of Disability Employment Policy is the successor to the President’s Committee on the Employment of People with Disabilities (PCEPD) and the Presidential Task Force on the Employment of Adults with Disabilities (PTFEAD).<sup>130</sup> PCEPD educated small businesses about ADA requirements, the benefits of hiring people with disabilities, and resources to help them employ workers with disabilities and included an initiative to improve employment opportunities for people with disabilities from diverse cultural backgrounds. PCEPD established

the Job Accommodation Network (JAN) to provide technical assistance to employers. *Promises to Keep* found JAN was “an especially important source of technical assistance for implementation of

Title I of the ADA.”<sup>131</sup> PTFEAD was established by Executive Order in 1998. PTFEAD, which met and worked over the course of several years, produced a number of recommendations, including the creation of a new Office of Disability Employment Policy led by an Assistant Secretary. ODEP was established in 2001.

ODEP is the only nonregulatory federal agency that promotes policies and coordinates with employers and all levels of government to increase the workplace success for people with disabilities.<sup>132</sup> ODEP is a sub-cabinet-level agency,<sup>133</sup> and works to develop and influence policies and practices to increase the number and quality of employment opportunities for people with disabilities. To fulfill this mission, ODEP

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*[A]s recently as January 2017 DOL found that “[a]lmost two-thirds (63 percent) of AJCs were ‘not fully accessible’ to people with disabilities.”*

promotes the adoption and implementation of policy strategies and effective practices to impact employment of people with all disabilities. ODEP disseminates policy strategies and effective practices, shares information, and provides technical assistance to government agencies, service providers, nongovernmental entities, and employers.<sup>134</sup>

ODEP has four Divisions: Policy Development with the four focus areas of Workforce Systems, Youth, Employment-Related Supports, and Employers; Policy Communication and Outreach; Administrative Systems and Financial Services, which includes Program Management; and Policy Planning and Research, with the focus areas of Program Management and Research and Evaluation.<sup>135</sup>

### ***Regulatory, Sub-Regulatory, and Policy Guidance***

ODEP provides important practical and policy support for the implementation of other federal laws that support the employment of people with disabilities. ODEP's strategic plan includes an objective to develop evidence-based policies, practices, and tools to foster a more inclusive workforce to increase quality employment opportunities for people with disabilities.<sup>136</sup> Pursuant to this objective, ODEP will (1) conduct analyses, research, and evaluation of the most successful disability employment policies and practices, and (2) leverage partnerships to drive policy change.<sup>137</sup> Since the passage of the ADA, ODEP has instituted a number of programs, initiatives, and research. The following paragraphs discuss some of ODEP's programs, initiatives, and research. For a complete list, visit the ODEP website at <https://www.dol.gov/odep/>.

In 2009, ODEP launched the Disability.gov website to provide a clearinghouse for disability employment information and instituted the Emerging Technologies Initiative to analyze employment practices using accessible technology.<sup>138</sup> Other 2009 ODEP efforts included the ePolicy Works collaborative platform to help agencies and stakeholders explore disability employment policy, the examination of mechanisms to support Personal Assistance Services for employees, and research on customized employment and telework.<sup>139</sup> In 2010, ODEP launched the Disability Employment Initiative (DEI), mentioned under the ETA discussed previously, and piloted a model of Project SEARCH to help individuals with intellectual and developmental disabilities transition from school to work.<sup>140</sup> This was followed in 2011 by the launch of the Integrated Employment Initiative to promote competitive integrated employment for people with significant disabilities.<sup>141</sup>

ODEP funded the Partnership on Employment and Accessible Technology in 2012 (originally launched as the Accessible Technology Action Center).<sup>142</sup> ODEP also established the National Center on Leadership for the Employment and Advancement of People with Disabilities (LEAD), and funded the National Technical Assistance and Demonstration Center on Preparing Youth with Disabilities for Employment (NCWD/Youth).<sup>143</sup> In 2013, ODEP hosted national dialogues on employment, assistive technology, and youth in transition.<sup>144</sup>

In 2014, ODEP launched the National Employer Policy, Research and Technical Assistance Center on the Employment of People with Disabilities, and PEATworks.org, a portal to help employers and the technology industry

adopt accessible technology, and expanded the Workforce Recruitment Program (WRP) to private employers.<sup>145</sup> In 2015, ODEP rebranded and continued to fund the Employer Assistance and Resource Network on Disability Inclusion (EARN) to help employers foster disability-inclusive workplaces, and provided funding to the National Collaborative on Workforce and Disability for Youth to promote positive transition outcomes for youth with disabilities.<sup>146</sup> In addition, ODEP launched the State Exchange on Employment and Disability (SEED) in 2015, and led the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities.<sup>147</sup>

Throughout this period, ODEP supported the U.S. Business Leadership Network, providing business-to-business support for the employment of people with disabilities, worked with employers to develop alliances and replicable model programs to employ people with disabilities, and conducted research on assistive workplace technology. ODEP continues to fund

JAN and EARN to provide practical technical assistance to employers to help them employ workers with disabilities, and the LEAD Center to promote systems-level change to increase disability employment.<sup>148</sup>

### ***Proactive and Reactive Strategies***

ODEP's strategies are primarily proactive, and its most proactive effort is its research work.

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***ODEP's strategies are primarily proactive, and its most proactive effort is its research work.***

ODEP's research tests and develops policies to improve access to training, transition services, and

employment support and accommodations for job seekers and workers with disabilities to ensure they have the skills businesses demand. ODEP's research also identifies and validates promising practices to help shape employment

services for people with disabilities.<sup>149</sup>

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***ODEP now plans to shift its focus to return-to-work strategies.***

Current ODEP research projects focus on youth

Supplemental Security Income recipients transitioning to employment, community college interventions for youth with disabilities, and employer policies on disability employment and return-to-work strategies. ODEP has sponsored other research projects to evaluate AJC accessibility, assess employer perspectives on employment of people with disabilities, increase knowledge of customized employment, explore funding for Personal Assistance Services at work, evaluate the effectiveness of Individualized Learning Plans, examine the effects of corporate wellness programs for people with disabilities, and analyze financial education for youth with disabilities.

ODEP now plans to shift its focus to return-to-work strategies. Previously, ODEP has focused

### **Current ODEP Research Projects**

- Youth Supplemental Security Income recipients transitioning to employment
- Community college interventions for youth with disabilities
- Employer policies on disability employment and return-to-work strategies

on employment of people with long-standing, often visible disabilities who mainly consider themselves as members of the disability community. People who develop a disability or health condition as they age frequently do not view themselves as having a disability or facing discrimination based on disability. Employment strategies aimed at people who develop a disability later in life tend to depend less on disability rights laws that address employer bias, stigma, and discriminatory practices, and more on treatment, retraining, and finding jobs. Specifically, the ODEP-funded Retaining Employment and Talent after Injury/Illness Network (RETAIN) focuses on “a strategy to return recently ill, injured, or disabled employees to work” by implementing early interventions for workers who “recently began experiencing difficulties at work due to injury or illness.”<sup>150</sup>

Serving people who acquire a disability or health condition during their working years and are at risk of exiting the workforce is important. People born with a disability or develop a disability as a youth, however, have long been denied entry to the workforce and are not traditionally served by programs designed for people who seek to return to work after acquiring a disability. Serving these populations is of fundamental importance to the effectiveness of the ADA, which was intended to address the discrimination that has traditionally kept people with disabilities from entering the workforce. **NCD recommends ODEP continue its focus on strategies that support changing workplaces to allow people with disabilities, including those with significant long-term disabilities to enter or remain in the**

**workforce, which includes the improvement of return-to-work/stay-at-work programs.**

### ***Interagency Collaboration and Coordination***

ODEP plays an educational and advisory role for federal regulatory and enforcement agencies by informing efforts and the solutions these agencies incorporate into resolution agreements, regulations, and guidance on the employment of people with disabilities. ODEP works to increase employment opportunities for people with disabilities by collaborating with agencies within<sup>151</sup> and outside DOL.<sup>152</sup>

ODEP’s greatest impact occurs when it infuses disability principles and practices into the programs of other federal agency programs.

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***ODEP’s greatest impact occurs when it infuses disability principles and practices into the programs of other federal agency programs.***

ODEP provided the foundations for WIOA and the implementing regulations and has given a roadmap for the transformation of state workforce development

systems. Because ODEP’s expertise and responsibility is not limited to a single disability rights law or program, it assists enforcement agencies understand the overlapping laws, policies, and practices in the disability area. Such cross-program insight can be particularly helpful to policymaking and enforcement agencies in the recognition of gaps and to avoid re-inventing the wheel. Some of ODEP’s greatest impact is on programs overseen, funded, or operated by other federal or state agencies.

ODEP has limited official authority, so it must obtain the cooperation of other federal agencies and interested partners in order to infuse its tools and insights into programs controlled by others. ODEP currently relies on informal means to

establish relationships to gain that cooperation.

**NCD recommends that ODEP create and oversee a working group of federal agencies to infuse promising practices into all federal employment programs in order to increase disability employment.**<sup>153</sup>

**NCD recommends that Congress and the President require federal agencies responsible for oversight of federal employment programs to consult with ODEP to incorporate promising disability practices and, by doing so, break down silos that exist between federal agencies.**

### ***Communication with Complainants and the Community***

ODEP manages the Campaign for Disability Employment, a nationwide media campaign to increase disability employment by promoting positive perceptions and high expectations of people with disabilities. National Disability Employment Awareness Month (NDEAM) each October celebrates the contributions of workers with disabilities and educates about the value of a diverse workforce. To support NDEAM activities, ODEP provides resources, including an online toolkit and posters. In 2017, according to ODEP, more than 16,000 NDEAM posters in English and Spanish were distributed and more than 40,000 people visited the NDEAM website.

While ODEP considers its customer base to be the general public, it often tailors messages and information to specific audiences, including public policymakers, public and private sector employers, disability service providers and students, job seekers, and workers with disabilities. Engagement activities include national outreach and awareness campaigns, the use of social media, online and in-person technical

assistance, national and local conferences, electronic customer service, and online dialogues. ODEP's status as a trusted source of information for employers and government agencies gives it an important role in disseminating information about enforcement activities, the meaning and purpose of disability rights policies, and practical means to implement disability employment rights.

Much of the impactful work ODEP accomplishes is not obvious to the public. In part, this is a virtue of ODEP's role as an expert advisor, researcher, and trusted messenger. ODEP does not have the resources to systemically collect and report information on the impact of its recommendations. ODEP evaluates its policy performance by measuring the number of Policy Outputs and Implementation Tools it produces. Policy Outputs include adoptions at the federal, state, or local level of legislative proposals, model legislation, or amendments recommended by ODEP; adoption of rules recommended by ODEP; formal policy guidance by federal agencies; and executive orders at the federal, state, or local level. Implementation Tools provide educational or explanatory information to support adoption and implementation of ODEP developed or recommended practices, policies, strategies, models, or theories, including toolkits, curricula, learning guides, model practice plans, primers, briefs, implementation guides, and policy templates. The FY 2017 Budget Justification and 2018–22 Strategic Plan<sup>154</sup> performance measures predict a significant (50 percent) reduction in the development and dissemination of implementation tools by ODEP over the next five years. DOL's FY18 Congressional Budget Justification forecasts only eight Policy Outputs in 2018 and only 41 Implementation Tools.<sup>155</sup>



## ***Training and Technical Assistance***

In part because ODEP lacks an enforcement role, employers and federal, state, and local government agencies seek solutions from ODEP and share strategies and lessons learned with ODEP. ODEP partners with employers to implement inclusive practices and policies that align with their business needs. Consequently, ODEP has been able to provide significant support to Federal Government efforts to implement Section 501 of the Rehabilitation Act and to develop and implement regulations under Section 503 that impact federal contractors. ODEP has developed a number of resources and toolkits that identify promising employment practices and strategies for recruiting, hiring, advancing, and retaining people with disabilities.

ODEP has supported state efforts to increase disability employment. ODEP conducted a self-employment demonstration project with three states and a national technical assistance (TA) center to highlight innovative models of self-employment service delivery. In addition, since 2012, ODEP has provided TA to states through its Employment First State Leadership Mentoring Program to help align state policies to support competitive integrated employment for people with significant disabilities.

ODEP's EARN Network helps employers tap the benefits of disability diversity and inclusion. JAN offers free, expert, and confidential guidance on workplace accommodations and disability employment issues and facilitates employment and retention of workers with disabilities by providing TA, training, and

other resources on job accommodations and by disseminating information and promoting best practices.<sup>156</sup>

ODEP's LEAD Center educates employers on best practices for hiring people with significant disabilities

through job customization and discovery. The LEAD Center also implements an initiative to educate state Equal Opportunity Officers about

WIOA nondiscrimination provisions. Through its Partnership on Employment and Accessible Technology (PEAT), ODEP established the *Policy Matters* webpage<sup>157</sup> to help employers, technology users, and technology providers

understand federal regulatory developments. To increase the participation of people with disabilities in the labor force, ODEP administers the Workforce Recruitment Program (WRP), which connects employers with prescreened college students and recent graduates with disabilities. Since 1995, the WRP has placed

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***The FY 2017 Budget Justification and 2018–22 Strategic Plan performance measures predict a significant (50 percent) reduction in the development and dissemination of implementation tools by ODEP over the next five years.***

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***ODEP has been able to provide significant support to Federal Government efforts to implement Section 501 of the Rehabilitation Act and to develop and implement regulations under Section 503 that impact federal contractors.***

thousands of persons with disabilities into federal and private employment.

ODEP measures the effectiveness of its TA through several means. The “pulse” survey measures the immediate impact of TA. ODEP generally receives scores of 85 percent or higher on these surveys. ODEP also measures effectiveness through requests for additional TA after an event. ODEP typically doubles the number of planned TA requests each year through such “demand-driven” events. This data almost certainly underestimates the impact of ODEP’s work. An important measure of ODEP’s work would be to count the number of entities that adopt policies and practices as a result of ODEP’s TA.

ODEP has taken a proactive approach to attempt to measure its impact. For example, ODEP’s Guideposts for Transition Success have been adopted by several states, including Alaska, California, Connecticut, Georgia, Minnesota, Missouri, and South Carolina. The SEED Initiative carefully tracks its policy and practice reach using a “policy tracker.” In FY17, SEED helped produce 36 policy outputs. Enacted legislation has ranged from the development of new state hiring programs to the creation of employer tax credits for hiring people with disabilities and improving access to transportation.

The impact of the work of ODEP on policies and practices for disability employment tends to be over the long term, and as a result ODEP is hindered in the ability to assess and communicate the impact of its work to the public. **NCD recommends that ODEP revisit**

**its prior recommendations to governments, enforcement agencies, employers, and service providers to evaluate the extent to which the recommendations were adopted. ODEP should follow up with the respective entities to discuss nonimplemented recommendations and provide assistance for implementation.**

ODEP conducted 1,066 outreach events in FY16, planned to conduct 521 in FY17, and plans 250 in 2018, a 50 percent reduction each year.<sup>158</sup> Similarly, ODEP conducted 1,185 TA events in 2016, 803 in 2017, and proposed 500 in 2018, substantial reductions each year.<sup>159</sup> ODEP reports that it actually conducted 1,730 TA events in FY17, plus 604 events conducted by EARN and JAN.<sup>160</sup>

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*In 2017, JAN provided 94,093 TA responses through phone, email, chat, and Skype, and its website received nearly 15 million requests from nearly 2 million visitors.*

In FY18 Quarter 1, according to staff, ODEP completed 42 planned and 146 additional “demand-driven” events. Collaborations were proposed to decrease from 35 to 30 from

2017 to 2018, and research projects to decrease from 38 to 30.<sup>161</sup> In 2017, JAN provided 94,093 TA responses through phone, email, chat, and Skype, and its website received nearly 15 million requests from nearly 2 million visitors.

### ***Adequacy of Agency Resources***

ODEP’s FY18 budget is \$38.2 million,<sup>162</sup> which is consistent with its budgets since FY 2010. ODEP’s annual budget averaged around \$33.7 million in constant dollars since 2008 (see Table C in Appendix A). Budget requests for FY 2018<sup>163</sup> and FY 2019<sup>164</sup> were \$27 million, maintaining 49 FTEs and reducing ODEP contracts and grants by approximately \$11 million.<sup>165</sup> In recent years,

ODEP allocated \$26–\$27 million (approximately 70 percent of its total budget) to advisory assistance services and grants.<sup>166</sup> The FY19 budget proposal reduces those expenditures by 42 percent,<sup>167</sup> and if adopted, ODEP would spend \$4.7 million on contracts (down from \$13.3 million) and \$10.8 million on grants (down from \$13 million).<sup>168</sup>

ODEP has traditionally performed much of its work through contracts with, or grants to, experts in the wide variety of areas that impact the employment of people with disabilities. The continual delays in the budget process and repeated short-term continuing resolutions, combined with substantially reduced budget requests, creates uncertainty that hinders ODEP's progress. ODEP is effective by having a small staff with a deep interest, expertise, and understanding of cross-disability issues, rights, and principles, while using an array of experts, researchers, and practitioners in subject matters affecting disability employment. Contracts and grants with subject matter experts, researchers, and practitioners allows access to particular expertise needed for a project, without the need for ODEP to hire permanent staff or develop infrastructure. A staff of 49 cannot have the necessary expertise in all the areas that ODEP needs to understand, influence, and educate.

**NCD recommends that Congress and the President ensure ODEP funding is flexible and focused on contracts with, and grants to, experts in the various fields affecting disability employment.**

### **Office of Federal Contract Compliance Programs (OFCCP)**

The Office of Federal Contract Compliance Programs was not evaluated in *Promises to*

*Keep*, but the report recommended that OFCCP strengthen collaboration with the EEOC.<sup>169</sup>

### **Overview of OFCCP**

OFCCP administers and enforces federal laws applicable to federal contractors and subcontractors that prohibit discrimination and promote equal employment opportunity of people with disabilities under Section 503 of the Rehabilitation Act and qualified veterans under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA).<sup>170</sup> Section 503 also authorizes OFCCP to investigate complaints of disability discrimination.<sup>171</sup> OFCCP is led by a director and is geographically composed of six regions with 48 area and district offices.<sup>172</sup>

Section 503 is currently applicable to any entity with a federal contract or subcontract of more than \$15,000.<sup>173</sup> The threshold to create an affirmative action program (AAP) under the Section 503 regulations is higher, applying to contractors with 50 or more employees and at least one single federal contract or subcontract of \$50,000 or more.<sup>174</sup> In September 2016, the Government Accountability Office (GAO) estimated that approximately 200,000 contractor establishments are subject to OFCCP oversight every year.<sup>175</sup>

### **Regulatory, Sub-Regulatory, and Policy Guidance**

In July 2010, OFCCP requested public comment on potential ways to strengthen the Section 503 regulations.<sup>176</sup> In 2010 and 2011, the OFCCP conducted multiple town hall meetings, webinars, and listening sessions with the contractor community, disability advocates, and other interested parties.<sup>177</sup> In December 2011, OFCCP published a proposed regulation seeking comment

on specific actions contractors and subcontractors would have to take to meet the affirmative action obligations.<sup>178</sup> The proposed regulations included increased data collection requirements and the establishment of a utilization goal for the employment of people with disabilities. The final regulations became effective as of March 24, 2014, with full compliance by contractor establishments required over a phase-in period.<sup>179</sup>

In response to comments from the contractor community citing increased costs and burdens, the final regulations eliminated or made flexible many of the data collection requirements in the proposed regulation. OFCCP also did not adopt a number of regulations, including those requiring contractors to develop written reasonable accommodation policies, annually evaluate job descriptions and qualification standards, and ensure that online job application portals are accessible to blind and visually impaired applicants.<sup>180</sup>

The final Section 503 regulations did establish, for the first time, a 7 percent workforce utilization goal for people with disabilities by federal contractors.<sup>181</sup> OFCCP made it clear this goal was not a quota or ceiling, but a management tool to inform decision making and provide accountability.<sup>182</sup> OFCCP also stated the 7 percent utilization standard was an aspirational target.<sup>183</sup> The final regulations require contractors to invite applicants to voluntarily self-identify as a person with a disability at the pre-offer stage of the hiring process. The regulations also require contractors to invite current employees to voluntarily self-disclose on a regular basis, but OFCCP did not adopt a proposal that contractors annually offer the invitation to self-disclose. OFCCP views the new regulations as a basic requirement for contractors to collect data in

order to assess the impact of the affirmative action plan for people with disabilities.

Under the new regulations, contractors need to maintain quantitative measurements and comparisons of the number of people with disabilities who apply for jobs and the number of people with disabilities hired (acknowledging the limits of voluntary self-identification) in order to create greater accountability for employment decisions and practices.<sup>184</sup> The final regulations further require prime contractors to include specific language in subcontracts in order to inform subcontractors about their responsibilities in an effort to increase compliance.<sup>185</sup> The new regulations seek to enhance information about the recruitment and employment of people with disabilities to enable contractors to improve their affirmative action hiring practices.

Though OFCCP is obligated to consider the burden imposed by a federal regulation on the contractors and subcontractors, several decisions made for the final regulations to reduce asserted burdens weakened attempts to improve the affirmative action provisions. For example, the proposed rule included a requirement that each contractor annually invite employees to self-disclose a disability, which the OFCCP revised in the final regulation to every five years and one additional reminder within the five years.<sup>186</sup>

Given the rapid turnover in employment, especially among younger workers, OFCCP's decision to reduce the voluntary disclosure opportunity required will produce less reliable data about the impact of affirmative action plans. Similarly, OFCCP did not adopt the requirement to maintain a written reasonable accommodation plan or the proposed changes that would have required federal contractors to review personnel policies on an annual basis as opposed to an

undefined “periodic” review requirement.<sup>187</sup> In rejecting several of the proposed changes, OFCCP noted the “general affirmative action obligations” of the contractors and stated the general obligations could be maintained through the flexible and less burdensome requirement of the already existing regulations.<sup>188</sup> With the understanding that OFCCP

is constrained by the requirements of Executive Orders 12866 and 13563 and subsequent guidance issued by the Office of Management and Budget, which generally require agencies to consider the cost of regulations and impose as little burden as

is necessary and assess the costs and benefits of alternatives, **NCD recommends that OFCCP ensure the primary focus in the development of all regulations, sub-regulatory guidance, and other policy materials pertaining to Section 503, and**

**the portions of VEVRA that address disabled veterans, is the advancement of the employment opportunities for people with disabilities and not the federal contractor.**

### ***Competent and Credible Investigative Process and Enforcement Action***

To enforce Section 503, OFCCP conducts (1) compliance evaluations of selected establishments and (2) investigations of individual complaints of disability discrimination. Every

year OFCCP generates a scheduling list of contractor establishments that will be subject to a review using data maintained by various federal agencies and neutral selection criteria. Mini-pools of selected establishments are then created for each of the OFCCP offices to review. A compliance review will typically begin with a desk

audit and may proceed to an onsite review and offsite analysis.<sup>189</sup> As part of the review, OFCCP asks for a comprehensive list of information from the contractor establishment that covers all the laws enforced by the OFCCP.

OFCCP complaint investigations are

conducted upon receipt of a complaint by an individual, group, or third party.<sup>190</sup> Outside of compliance reviews and complaint investigations, there is no additional oversight of Section 503 compliance efforts by a federal

contractor. OFCCP emphasizes training and technical assistance for entities not subject to a review or investigation. As OFCCP is responsible for other affirmative action and

equal employment opportunity laws, OFCCP compliance officers are cross trained on all laws covered by the office.

The number of OFCCP compliance evaluations have declined significantly in the past four fiscal years. OFCCP completed 3,839 compliance evaluations in FY 2014 but only 1,142 in FY 2017.<sup>191</sup> Based on the GAO estimate that 200,000

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*Given the rapid turnover in employment, especially among younger workers, OFCCP’s decision to reduce the voluntary disclosure opportunity required will produce less reliable data about the impact of affirmative action plans.*

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*OFCCP completed 3,839 compliance evaluations in FY 2014 but only 1,142 in FY 2017 . . . about 0.6 percent of the total number of contractor establishments.*

contractor establishments are required to comply with Section 503, the number of compliance reviews completed in FY 2017 represented about 0.6 percent of the total number of contractor establishments. In FY 2014, OFCCP discovered Section 503 violations in about 13 percent of the reviews. Between FY 2015 and 2017 the violation rate declined to about 5 percent of the reviews.

OFCCP data on closed Section 503 compliance reviews during FY 2008 to 2017 indicate that 188 establishments were found to have violated Section 503.<sup>192</sup> Of these establishments, OFCCP found 45 establishments violated the requirement to provide a reasonable accommodation,

34 establishments violated the recruitment requirements, and 29 establishments violated the affirmative action program requirements.

OFCCP conducted such a small percentage of compliance reviews that it is difficult to assess any systemic patterns in Section 503 violations based on the data.

According to the 2016 GAO report, the manner in which OFCCP selects contractors for compliance reviews fails to ensure those at highest risk of violations are reviewed.<sup>193</sup> While noting OFCCP's position that a neutral selection process required under the Fourth Amendment of the U.S. Constitution is not necessarily random, the GAO reported the sample of contractor establishments drawn for selection for reviews is not generalizable, so no conclusions about noncompliance can be drawn from the sample.<sup>194</sup> In addition, the GAO expressed concern with imbalances in how compliance reviews were allocated across the OFCCP offices, noting that

OFCCP staffing levels in the district offices do not geographically correspond to the distribution of federal contractors.<sup>195</sup> OFCCP indicated the selection process is not randomized, in part to ensure contractor establishments of sufficient size are selected to identify systemic problems. OFCCP also seeks to complete a smaller number of quality reviews rather than a larger number of more superficial reviews. OFCCP is seeking ways to increase the number of compliance reviews through reassignment of establishments selected for a review in response to the GAO report.

OFCCP only reviews contractor written affirmative action plans and voluntary self-

disclosure procedures required under Section 503 upon conducting a compliance review or an investigation. Federal contractors who meet the 50 employee and \$50,000 amount thresholds,

however, are required to develop such plans within 120 days of receipt of a federal contract.

**NCD recommends that OFCCP develop new procedures outside of the compliance review process, such as a random request for affirmative action plans of contractor establishments, to better ensure compliance with the Section 503 written affirmative action requirements.**

According to OFCCP investigations data, between FY 2008 and 2017 the agency completed 1,428 investigations of complaints filed against federal contractors. Of these investigations, 44 percent, or 627 investigations, involved a disability complaint with 24 of these investigations classified as class action. OFCCP found a violation in 72 of these disability

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*OFCCP conducted such a small percentage of compliance reviews that it is difficult to assess any systemic patterns in Section 503 violations based on the data.*

investigations, four of which involved class action investigations.

OFCCP resolves almost all violations discovered through conciliation agreements.<sup>196</sup> A very small number of cases not resolved through conciliation are referred to the Office of the Solicitor. According the 2016 GAO report,<sup>197</sup> and confirmed by OFCCP, debarments are rarely, if ever used. The GAO reported “OFCCP officials told [the GAO] they prefer to obtain compliance through conciliation agreements over debarment because contractors who are debarred are no longer under OFCCP’s jurisdiction and not subject to the worker protection requirements the agency oversees.”<sup>198</sup>

Despite the preference against debarment reported by the GAO, the Office of the Solicitor indicates that debarment is used as a strategic incentive to move contractors to compliance. OFCCP cannot impose monetary penalties. Relief is limited to “make whole relief,” which returns the employee to the position they would be in had they not been a victim of discrimination, such as reinstatement and award of back pay. At the conclusion of litigation, if the contractor does not prevail, the final decision gives the contractor the choice either to remedy the violation within 60 days of the decision or be debarred. Facing this choice, debarment is rarely necessary because the contractor makes the decision to comply.

Even with a small number of compliance reviews conducted each year, OFCCP gives the contractor 45 days prior notice to the

commencement of a compliance review and additionally gives the contractor 30 days to provide its Affirmative Action Program to OFCCP for review. Since there is a minimal chance OFCCP will select an individual establishment for a review in a given year, and the advance notice enables the contractor to correct deficiencies, a federal contractor has little incentive to rigorously comply based on OFCCP current enforcement policies. Given the small number of OFCCP compliance reviews, this practice dilutes the overall impact of the OFCCP compliance evaluations on all covered federal contractors.

**NCD recommends that OFCCP modify its procedures pertaining to compliance reviews by (1) eliminating advance notice to contractors that have been chosen for compliance reviews to increase the deterrent impact of reviews; (2) conducting a larger number of compliance reviews that are less in depth and focused on common infractions, and if an infraction is found, expanding the scope of the review; (3) choosing contractor establishments for a review that possess risk factors for Section 503 noncompliance; and (4) considering all legal mechanism, up to and including debarment, when action is necessary against noncompliant contractors.**

### ***Interagency Collaboration and Coordination***

Under Section 503, OFCCP conducts compliance evaluations of federal contractor establishments,

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*Since there is a minimal chance OFCCP will select an individual establishment for a review in a given year, and the advance notice enables the contractor to correct deficiencies, a federal contractor has little incentive to rigorously comply . . .*

and upon receipt of a complaint of discrimination in employment based on disability, either directly investigates or refers the complaint to the EEOC. The collaboration between OFCCP and EEOC is discussed in Chapter 1.

### ***Training and Technical Assistance***

OFCCP seeks to achieve compliance with Section 503 in large part through the provision of training and technical assistance to all contractor establishments. According to the GAO report, beginning in 2012 OFCCP began to decrease the number of outreach events in order to refocus its outreach program to support the enforcement role of the agency.<sup>199</sup> Outreach events declined 80 percent between 2012 and 2014.<sup>200</sup> The GAO reported that in addition to outreach events, OFCCP conducts “compliance assistance events” with contractors.<sup>201</sup> As with outreach events, the number of contractor assistance events has declined 30 percent since 2012, and 20 out of the 24 contractors the GAO interviewed stated they use third-party support to assist with compliance.<sup>202</sup>

OFCCP indicated that the agency is making improvements to training materials available to contractors. The OFCCP website offers a comprehensive list of webcasts, fact sheets, and approved and recommended forms to assist contractors and subcontractors comply with the regulations. The OFCCP trainings and guidance documents generally appear complete and well thought out. OFCCP also reported employing adult education techniques to create more quality trainings for contractor staff. OFCCP is further improving and creating a

more rigorous training for compliance officers. The GAO reported that OFCCP compliance materials varied in the degree to which simple language is used, ranging from a 12th grade to postgraduate reading level.<sup>203</sup> A test of several OFCCP materials for language simplicity for this study confirmed the GAO’s analysis. **NCD recommends that OFCCP better ensure that materials and documents are written in simple language according to the Plain Writing Act.**

### ***Adequacy of Agency Resources***

Adjusted for inflation, OFCCP’s budget increased by 1.35 percent since FY 2004, with a significant increase in FY 2010, but budget decreases occurred during the past two fiscal years both in actual and inflation-adjusted dollars (see Table D in Appendix A). As with the EEOC, however, of greater concern is the decline in staff. Despite budget increases in FY 2010 and a relatively flat budget since FY 2004 accounting for inflation, the number of OFCCP staff has declined at a steady pace. Since FY 2004, OFCCP shed a quarter of its FTEs (see Table E in Appendix A). OFCCP reports that it seeks to better balance enforcement methods in part through staff attrition in response to the GAO’s concern of the lack of congruence between office staffing and contractor locations. In FY 2014 and 2015, OFCCP sought to reduce staff levels through various incentives in response to budget pressures.<sup>204</sup> When OFCCP will bottom out in staffing numbers and again experience staff increases is an open question. **NCD recommends that OFCCP hire and train a sufficient number of**

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***Since FY 2004, OFCCP shed a quarter of its FTEs.***



**compliance officers in areas where federal contractors are concentrated in order to increase the number of compliance reviews.**

## **Office of the Solicitor (SOL)**

The Office of the Solicitor (SOL) provides legal counsel to, and representation of, the various DOL divisions. The SOL also assists with compliance review, enforcement, and policy development activities. Solicitor staff described during interviews the multifaceted role of the SOL in working closely with DOL entities to develop and roll-out regulations, train DOL staff, respond to questions, and develop frequently asked questions (FAQ). For example, SOL worked with OFCCP in 2014 to revise the Section 503 regulations. On matters requiring a centralized perspective the SOL Civil Rights and Labor Management Division serves as a liaison between the regional SOL offices and the OFCCP headquarters office in Washington, DC.

OFCCP places an emphasis on voluntary compliance and litigates very few cases, and the SOL's primary enforcement role with OFCCP occurs when conciliation fails, and a federal contractor seeks a hearing before a DOL Administrative Law Judge. The contractor can also appeal to the DOL Administrative Review Board and, if still dissatisfied, to a U.S. district court. The SOL represents OFCCP in the administrative process and in the rare case the contractor appeals to a U.S. district court. In May 2018, there were approximately 11 cases pending at the administrative level (including one at the Administrative Review Board) and one case in federal court.

As legal counsel for WHD, the SOL has a critical role in enforcing all provisions of the Fair Labor Standards Act (FLSA) and the Family and

Medical Leave Act (FMLA). The Solicitor has been involved in defending a DOL decision in the case of three employees with disabilities who petitioned for an administrative review of the payment of a subminimum wage under Section 14(c). As discussed in more detail in the next section, a DOL Administrative Law Judge and the DOL Administrative Review Board found in favor of the three employees. The SOL submitted a brief in support of most of the positions of the employees during the Administrative Review Board process, and after the employer appealed, SOL has defended the Board's ruling in U.S. district court, agreeing with the employees' interpretation of Section 14(c). The SOL anticipates that it will be involved as other employees request a hearing on the payment of subminimum wages under Section 14(c).

## **Wage and Hour Division (WHD)**

### **Overview**

The Wage and Hour Division,<sup>205</sup> created through the FLSA in 1938, is responsible for the administration and enforcement of a wide range of laws that cover virtually all private, state, and local government employment. The mission of WHD "is to promote and achieve compliance with labor standards to protect and enhance the welfare of the Nation's workforce" through the enforcement of federal minimum wage, overtime pay, recordkeeping, and child labor requirements of the FLSA.<sup>206</sup> Among the other laws enforced by WHD are the FMLA, the prevailing wage requirements of the Davis Bacon Act and the Service Contract Act, and the subminimum wage provision of Section 14(c) of the FLSA. WHD is currently led by an administrator and contains Offices

for Government Contracts; Policy; Planning; and Performance, Evaluation, and Training. WHD also works through five geographic administrative regions.

This section focuses upon WHD's enforcement of Section 14(c) along with some consideration of WHD's enforcements of the FLMA.

### **Overview of Section 14(c)**

Section 14(c), known as the special or subminimum wage program, allows WHD to issue certificates "to the extent necessary to prevent the curtailment of opportunities for employment," to permit employers to pay a subminimum wage to people with disabilities whose earning or productive capacities are impaired by their disability.<sup>207</sup> An employer must apply for, and receive, a 14(c) certificate from WHD before it may pay a subminimum wage.<sup>208</sup> Most certificate holders are required to renew the certificate every two years.

WHD classifies a 14(c) certificate as either a business establishment, work center, known also as community rehabilitation programs (CRPs), or a hospital or institution.<sup>209</sup> School officials may also request authorization for students with disabilities to participate in school work experience programs (SWEPs) in exchange for subminimum wages, and State vocational rehabilitation counselors and Department of Veterans Affairs officials may seek permission to grant or extend temporary authorization to employ workers with disabilities at subminimum wage rates.

WHD has broad authority to administer and enforce Section 14(c).<sup>210</sup> WHD's responsibilities

have expanded since 2008 to include Section 511 of WIOA and the minimum wage provisions for certain federal contractors under Executive Order 13658, which impacts employees paid under Section 14(c). Table 1 lists the requirements of Section 511 and EO 13658, along with the responsibilities of WHD.

### **Regulatory, Sub-Regulatory, and Policy Guidance**

While WHD has not issued new regulations for the 14(c) program, it has sought to increase communications with certificate holders and has worked with the Department of Education to issue guidance related to the requirements of Section 511.<sup>211</sup>

### **Proactive and Reactive Strategies**

WHD is responsible for the entire Section 14(c) certificate application process, which includes

both new and renewal certificate applications. The application review process is conducted almost entirely by WHD's Mid-West Regional Office through paper applications. During the application review, WHD staff, among other things, ensure that the employer has provided appropriate documentation and certified that wages are and will be calculated correctly. Applications are typically rejected only if documentation is missing, though an employer is given the opportunity to submit required information. In almost all cases, the application is approved. The 14(c) application process functions essentially as a voluntary compliance system.

Few WHD staff are dedicated to providing adequate oversight of the thousands of 14(c) paper applications received each year. In

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*The 14(c) application process functions essentially as a voluntary compliance system.*

**Table 1: WHD Expansion of Enforcement Authority**

Law	Requirements	WHD Responsibilities
<p><b>Section 511 of WIOA<sup>212</sup></b></p>	<p>Prohibits an employer from hiring a person with a disability who is age 24 or younger at a subminimum wage unless certain conditions are met (including applying for vocational rehabilitation services and receiving access to pre-employment transition services).</p> <p>Prohibits an employer from paying or continuing to pay a person with a disability, regardless of age, a subminimum wage unless he or she is provided with career counseling services and information about opportunities for competitive integrated employment every six months in the first year of employment and annually thereafter.</p> <p>Prohibits state and local educational agencies from contracting with Section 14(c) certificate holders to operate a program for individuals age 24 or younger under which work is compensated at a subminimum wage.</p>	<p>Under WIOA, employers with 14(c) certificates who have failed to meet the requirements of Section 511 are required to pay the minimum wage for each employee who would otherwise be eligible for the payment of a subminimum wage under the 14(c) program. WHD is authorized “to seek back pay at the full minimum wage rate for each individual for whom the mandatory services and/or documentation is not provided or does not meet the established criteria.”<sup>213</sup></p>
<p><b>EO 13658</b></p>	<p>Imposes a minimum wage rate requirement (e.g., originally \$10.10 per hour) on Section 14(c) certificate holders that enter into new covered service and concessions contracts with the Federal Government.</p>	<p>WHD is charged with enforcing the Executive Order’s minimum wage requirements.<sup>214</sup></p>

2001, the GAO raised concerns about WHD mismanagement of the program because of, among other issues, an apparent lack of strategic enforcement, training, guidance, and data collection.<sup>215</sup> In response to some of these problems, in January 2018 WHD submitted a request to the Office of Management and Budget (OMB) to transition the 14(c) certificate application process to an electronic platform. WHD justified the request in part to its expanded responsibility for enforcement, including under Section 511, and that with electronic capabilities WHD could better target compliance efforts.

The development of a 14(c) certificate electronic information system is important for WHD to meet its statutory obligations. For example, to comply with Section 511, a revised WHD certificate application form now requires employers to list every youth worker who is age 24 or younger and affirm that the worker has received required counseling, information, and referrals. The current system of paper applications, lack of a centralized electronic database, the design of the 14(c) application, and the number of applications received have made data-driven oversight by WHD exceedingly difficult. According to WHD, they are developing

an online application system with an expected launch date of late 2018. Time will tell if the electronic application system will alleviate the current issues.

WHD tracks the total number of employers holding a 14(c) certificate, but there is no accurate count of the total number of workers with disabilities paid subminimum wages. Outside an estimate as part of the 14(c) certificate application, employers are not required to submit such information to WHD. The Division, however, cited in the same month wildly varied estimates of the number of workers employed by 14(c) certificate holders to the Council and Congress ranging from approximately 141,081 to 321,131 employees.

WHD has clarified that the 141,081 estimate represents only those workers employed at the certificate holder's main establishment, whereas 321,131 represents the estimated total of workers employed at all establishments associated with the certificate holder. Lacking concrete information about the number employees paid under 14(c) certificates, WHD has historically been hamstrung in its ability to justify additional funding, oversight, or other resources. WHD did not include a request to count the total numbers of employees paid a 14(c) wage as part of the effort to obtain

OMB approval for a new electronic information platform.

**NCD recommends WHD amend the 14(c) certificate application form to collect information sufficient to determine the total number of employees paid a subminimum wage under Section 14(c).**

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*The current system of paper applications, lack of a centralized electronic database, the design of the 14(c) application, and the number of applications received have made data-driven oversight by WHD exceedingly difficult.*

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*WHD tracks the total number of employers holding a 14(c) certificate, but there is no accurate count of the total number of workers with disabilities paid subminimum wages.*

According to WHD, the number of certificate applications per year has dropped considerably, decreasing by more than half from 2,540 in FY 2008 to 1,089 in FY 2017. Table 2 contains the number of 14(c)

certificate applications received by WHD, the number of those applications received that seek to renew a certificate, and the number of certificates issued by WHD from FY 2008 to FY 2017. WHD staff do not follow up with employers who fail to renew a 14(c) certificate and thus WHD lacks an understanding of why certificates are not renewed. Given the outcome of a recent WHD investigation discussed below,

there is a significant risk that employers may continue to pay subminimum wages without a certificate. Seventeen years ago, the GAO noted that WHD "did little to ensure that employers whose 14(c) certificates have expired do not continue to pay workers special minimum wages."<sup>216</sup> **NCD recommends that WHD collect and systematically track how many 14(c)**

**Table 2: Number of 14(c) Certificate Applications per Year; Renewal Applications per Year; and 14(c) Certificates per Year**

Fiscal Year	Certificate Applications	Renewal Applications	Certificates Issued
2008	2,540	2,354	2,534
2009	2,506	2,299	2,496
2010	2,295	2,164	2,281
2011	2,221	2,074	2,214
2012	2,235	2,076	2,196
2013	2,190	1,918	2,154
2014	1,919	1,700	1,867
2015	1,529	1,453	1,493
2016	1,360	1,285	1,303
2017	1,089	1,051	866

Data Source: WHD

**certificates have expired, and the reasons for the expiration and the nonrenewal of the certificate.**

**NCD recommends that WHD use enforcement and regulatory authority available under the FLSA to determine the extent to which employers who do not renew a 14(c) certificate continue to pay employees with disabilities a subminimum wage.**

In December 2015, three employees at a sheltered workshop in Ohio filed a petition under a rarely, if ever used, provision under Section 14(c), which allows for a DOL Administrative Law Judge (ALJ) to review the payment a subminimum wage.<sup>217</sup> In a precedent-setting opinion, the ALJ found, among other things, that the workshop failed to establish that the three employees were “disabled for the work they

performed,” a requirement that must be met before an employer can pay 14(c) subminimum wages.<sup>218</sup> The ALJ awarded the employees the regular minimum wage going forward, as well as back pay.<sup>219</sup> The DOL Administrative Review Board (ARB) upheld the ALJ’s decision and the employer appealed to a U.S. district court, where the matter remains at the time of this report.<sup>220</sup>

WHD took steps to include the ALJ and ARB decisions into the Division’s enforcement practices. WHD revised the 14(c) certificate application form to require that an employer submit a signed representation that “[w]orkers employed under the [14(c) program] have disabilities for the work to be performed.”<sup>221</sup> WHD staff report that they have also incorporated the “disabled for the work” standard into existing directed investigations.

The 14(c) certificate application forms, however, do little to advise employers that employees with disabilities, even those paid a subminimum wage, are entitled to an individualized assessment and the provision of reasonable accommodations under the ADA. This includes providing accommodations during required time studies to assess productivity and when employers

consider whether an employee is disabled for the work performed.

**NCD recommends that WHD, working with the EEOC as appropriate, create technical guidance for 14(c) certificate holders, which explains that an employee “disabled for the work” on one task does not establish that the employee is “disabled for the work” on other tasks, and state clearly on the 14(c) application form, certificates, and on other documents that an employee paid a 14(c) subminimum wage has rights under Title I of the ADA, including reasonable accommodations.**

### ***Competent and Credible Investigative Process and Enforcement Action***

WHD enforces 14(c) requirements predominately through (1) a review of materials submitted during the application process, and (2) agency-initiated targeted investigations. WHD has

historically placed a low priority on the 14(c) program given its expansive enforcement mandate and proportionally limited resources.

WHD had refocused its overall enforcement efforts to areas where issues can be addressed systemically and “where large numbers of vulnerable workers are found.”<sup>222</sup> The DOL 2018-2022 Strategic Plan states that WHD identifies

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*The 14(c) certificate application forms . . . do little to advise employers that employees with disabilities, even those paid a subminimum wage, are entitled to an individualized assessment and the provision of reasonable accommodations under the ADA.*

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*In 2017 and 2018, however, there appears to have been a reprioritization of WHD resources from targeted strategic enforcement toward compliance assistance to employers.*

“where the data and the evidence indicate the problems are largest, emerging business models are more likely to lead to violations, and workers are least likely to exercise their rights.”<sup>223</sup> In 2017 and 2018, however, there appears to have been a reprioritization

of WHD resources from targeted strategic enforcement toward compliance assistance to employers. The FY 2018 budget request includes programmatic increases totaling \$3 million and an additional 15 FTEs, to be used “to position the agency with staff and resources to modernize its approach to delivering useful and effective compliance tools that support the employer

community.”<sup>224</sup> By contrast, the agency’s FY 2017 budget request sought additional resources to conduct “directed investigations that are strategically selected and executed to solve the most important compliance challenges that include protecting workers in industries that employ business models that are at high risk of wage and hour violations.” It is unclear what

impact this apparent reprioritization will have on enforcement of Section 14(c), or if WHD can continue to reverse the problems identified in the 2001 GAO report.

Since FY 2009, WHD maintains that it had “undergone a significant change in how [it] carries out [its overall] mission,” namely, by adopting a strategic enforcement approach with three priorities.<sup>225</sup> As a result of these efforts, WHD issued a 2010 report on *Improving Workplace Conditions Through Strategic Enforcement*,<sup>226</sup> showcasing evidence that proactive, agency-initiated, and strategically targeted investigations, known as “directed investigations,” had a deterrent effect upon violators not seen following complaint-based investigations. After the report, WHD took

*[WHD] documented “a high prevalence” of FLSA and other violations among the 14(c) certificate holders investigated.*

steps to refocus Section 14(c) oversight through strategically targeted enforcement. These efforts resulted in an increase in directed investigations, internal analysis, and evaluation of the program; formal resolution of agency investigations through settlement agreements; and revocations of Section 14(c) certificates.

WHD has not publicly released data from the internal analysis of strategically targeted enforcement but has noted that the analysis was not a randomized sample. WHD staff report, however, learning several important lessons. First, the agency documented “a high prevalence” of FLSA and other violations among the 14(c) certificate holders investigated. In many instances, employers were unaware of the requirements

**Table 3: Number of 14(c) Investigations and Overall Violations**

Fiscal Year	FLSA 14(c) Investigations	FLSA 14(c) Investigations with Violations (Any Act)		
	Cases	Cases	Back Wages	Employees Impacted
2008	186	129	\$ 1,088,509.94	4,070
2009	133	97	\$ 354,233.45	3,369
2010	153	94	\$ 678,676.81	4,196
2011	360	299	\$ 1,506,792.28	11,571
2012	258	218	\$ 1,518,922.89	9,556
2013	238	196	\$ 1,392,715.55	7,445
2014	284	232	\$1,288,503.91	8,986
2015	189	152	\$ 1,530,463.63	7,842
2016	201	167	\$ 2,573,799.05	9,133
2017	217	195	\$ 2,474,476.61	7,302

Data Source: WHD

**Table 4: Specific Violations Identified After Investigations Related to 14(c)<sup>227</sup>**

Fiscal Year	FLSA 14(c) Investigations with 14(c) Violations			FLSA 14(c) Investigations with SCA, PCA, or EO 13658 Violations		
	Cases	Back Wages	Employees	Cases	Back Wages	Employees
2008	116	\$ 970,069.18	3,688	4	\$ 38,048.63	61
2009	84	\$ 277,548.68	3,236	3	\$ 10,509.13	23
2010	81	\$ 603,819.33	3,878	4	\$ 2,836.34	18
2011	278	\$1,171,895.21	10,929	18	\$131,775.24	320
2012	194	\$ 952,796.12	8,756	7	\$ 375,473.05	193
2013	171	\$ 1,035,890.90	7,035	6	\$ 41,765.07	54
2014	189	\$ 869,308.99	8,370	10	\$ 69,643.12	94
2015	123	\$ 1,366,211.18	7,424	7	\$ 60,315.52	212
2016	127	\$ 1,853,744.25	8,086	3	\$ 26,499.64	37
2017	151	\$ 1,959,447.81	6,405	8	\$ 96,265.52	123

Data Source: WHD

Note: SCA refers to the McNamara O’Hara Service Contract Act Service Contract Act, PCA to the Walsh-Healey Public Contracts Act, and EO 13658 to Executive Order 13658.

of Section 14(c) or did not implement the requirements appropriately. A significant portion of employers with 14(c) violations did not conduct appropriate prevailing wage surveys. WHD staff signaled a need for technical assistance materials and outreach to staff at community rehabilitation program 14(c) certificate holders. **NCD recommends that WHD produce additional training materials, such as a desktop guide, targeted for use by community rehabilitation program staff.**

Tables 3 and 4 provide data on WHD 14(c) investigations, the number of violations uncovered, and back wages obtained. The data indicates that WHD has maintained a somewhat consistent level of 14(c) investigative enforcement over time—averaging

approximately 200 investigations per year between FY 2007 and 2017, with a high of 360 investigations during FY 2011. The substantial limitation of WHD’s data collection prevents an accurate estimate of the proportion of WHD-directed versus complaint-initiated investigations each year. WHD reports that the substantial increase in 14(c) investigations in FY 2011 reflects an uptick in WHD-directed investigations, and that it increased directed investigations in 2011 for the purpose of conducting a statistical analysis of the 14(c) program.

WHD enforcement efforts over the past five years have resulted in first-of-its-kind settlement agreements and significant relief to employees paid a 14(c) wage, serving as models of success for WHD-initiated



investigations and interagency enforcement. In June 2013, following a directed investigation of Training Thru Placement, Inc. (TTP), a sheltered workshop in Rhode Island, for the first time in its history WHD revoked a CRP's 14(c) certificate.<sup>228</sup> WHD found that TTP failed to (1) determine the appropriate subminimum wage, (2) properly record and pay employees for all hours worked, and (3) determine the prevailing wage rates for workers performing similar work in the area. The workshop also falsified documents in order to mislead investigators. TTP agreed to pay back wages to nearly 100 workers with disabilities and connect the workers with benefits planning counselors and other resources.<sup>229</sup>

WHD's strategic enforcement efforts resulted in four other noteworthy actions. In October 2015, WHD found that a workshop in Kentucky failed to conduct timely and accurate time studies to determine the correct subminimum wages for more than 100 workers with disabilities. WHD then revoked another certificate in August 2016, this time at a center in West Virginia, after an investigation found that the employer failed to pay 12 workers with disabilities appropriate wages and for violations of the McNamara O'Hara Service Contract Act (SCA).<sup>230</sup> The sheltered workshop received significant revenue from janitorial contracts through the federal SourceAmerica program and the West Virginia State Use program.<sup>231</sup> WHD does not track how many of its enforcement actions involve entities that have 14(c) certificates and also participate in the AbilityOne, SourceAmerica,

or National Industries for the Blind programs.

**NCD recommends that WHD track the extent to which community rehabilitation programs participate in the AbilityOne program, the number of legal violations, and the number of referrals made by WHD to the AbilityOne program for enforcement.**

In March 2018, a WHD investigation and litigation resulted in a federal jury verdict against the Randolph County Sheltered Workshop, Inc., also in West Virginia. The court ordered the workshop to pay back wages to 34 employees for operating without a 14(c) certificate and failing to post required information about the rights of people paid subminimum wages. A month later, in April 2018, WHD revoked yet another 14(c)

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certificate and denied a renewal application after an investigation of a sheltered workshop in Illinois. WHD found nearly 250 workers with disabilities being exploited, and specifically

that the employer (1) failed to timely perform appropriate wage surveys and to conduct proper time studies on all jobs performed by workers with disabilities, (2) illegally paid workers with gift cards instead of wages, and (3) concealed relevant and material information.<sup>232</sup> The workshop was ordered to pay all current workers the regular federal minimum wage and pay back wages to all workers who had performed work at a subminimum wage over the preceding two years.

WHD's enforcement actions also showcase a need for diligent oversight of 14(c) certificates issued to schools and the relationship between schools and 14(c) employers. WIOA prohibits

contracts between schools and 14(c) entities.<sup>233</sup> While WHD provides 14(c) certificates to more than 100 SWEPs,<sup>234</sup> it does not track the number of complaints filed for violations of Section 511 or the amount of back wages obtained. WHD staff could not identify any complaint filed with the Division since the enactment of WIOA in 2014. WHD reports that such data is combined by the Division into its overall enforcement data and not tracked as a disaggregated number.

While Section 511 does not expressly prohibit school districts from holding 14(c) certificates, continuing to pay subminimum wages instead of providing integrated employment-related transition services to students with disabilities is counter to the essential purpose of Section 511: to provide students with disabilities a meaningful opportunity to work in

competitive integrated employment. School systems that use SWEPs as part of transition, to the exclusion of integrated transition services, may violate the ADA under the U.S. Supreme Court's *Olmstead v. L.C.* decision.<sup>235</sup> WIOA states that "work-based learning experiences" provided as part of pre-employment transition services to students with disabilities must be "provided in an integrated environment to the maximum extent possible."<sup>236</sup> Vigorous enforcement by WHD, in collaboration with the U.S. Department of Education, should significantly reduce, if not eliminate, SWEPs because of WIOA

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*WHD staff could not identify any complaint filed with the Division since the enactment of WIOA in 2014.*

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*Vigorous enforcement by WHD, in collaboration with the U.S. Department of Education, should significantly reduce, if not eliminate, SWEPs because of WIOA requirements.*

requirements. **NCD recommends WHD undertake a focused strategic enforcement effort to determine the extent of SWEP compliance with Section 511 of the WIOA. Such effort could begin with a survey of all SWEPs to determine those more likely to violate Section 511.**

WHD actions signal that continued support for WHD initiated 14(c) enforcement is vital to protect the rights of employees with disabilities paid under Section 14(c). Without a randomized sample of 14(c) programs from which to conduct enforcement activities, WHD remains unaware of the statistical prevalence of FLSA violations in the 14(c) program and what kind of entities are most likely to violate program rules. Randomized samples, used periodically in addition to other 14(c) investigations, can provide a much richer understanding of potential violators enabling WHD to better direct 14(c) investigation given limited resources. The recent DOL enforcement actions, however, should alert policymakers to the high gravity of harm that results to workers with disabilities when violations occur and the importance for WHD to continue directed investigations to undercover violations.

Based on WHD data, when 14(c) investigations are conducted, even if not as part of randomized surveys, they yield a high incidence of FLSA violations and other laws. In

many instances, WHD obtains back wages after uncovering violations. In FY 2017, WHD obtained approximately \$2.5 million in back wages for approximately 7,300 workers with disabilities as a result of 217 Section 14(c) investigations. The per capita recoupment of back wages is exceedingly modest—in FY 2017, an average of \$338.87 per person. The low per capita recoupment may be because WHD resources

are not strategically directed either at the larger CRPs that hold 14(c) certificates or those certificate holders with risk factors for violations.

**NCD recommends WHD continue to prioritize the use of directed enforcement investigations as it did in FY 2011 to ensure effective enforcement and deterrence.**

### ***Communication with Complainants and the Community***

WHD has added online compliance assistance tools for CRPs as part of its outreach efforts. In

particular, WHD created 13 online subminimum wage calculators to assist entities in calculating prevailing wages, commensurate hourly wages, and piece rates as required to meet the Section 14(c) requirements. WHD also published a user guide on the use and functions of the 14(c) online calculators.

In contrast, there is exceedingly little instruction on WHD website about how and where an employee may file a petition for an ALJ review of the payment of 14(c) subminimum

wages as used by the three employees in Ohio. A Frequently Asked Questions section about WHD complaint-filing process does not mention the 14(c) petition process at all.<sup>237</sup> WHD further does not provide outreach and technical assistance to workers with disabilities about their right to petition a review of their wages or offer an electronic platform for 14(c) employees

with disabilities to submit a complaint.

**NCD recommends that WHD create an online form by which an employee with a disability may request a hearing to review the payment of a**

**subminimum wage through the process contained in Section 14(c).**

**NCD recommends WHD conduct outreach to 14(c) employees with disabilities about**

**their rights and the process to petition for review of their wages and modify all relevant outreach materials and posters to describe this right.**

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*In FY 2017, WHD obtained approximately \$2.5 million in back wages for approximately 7,300 workers with disabilities as a result of 217 Section 14(c) investigations.*

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*A Frequently Asked Questions section about WHD complaint-filing process does not mention the 14(c) petition process at all.*

Over the past three years, the number of WHD 14(c) outreach events has declined from a peak of 32 in FY 2014.<sup>238</sup> Since FY 2008 WHD conducted on average 22 outreach events in 14(c) a year, but in 2017 WHD made nearly 3,000 contacts or presentations to the community about the laws that it enforces, with just 16 presentations exclusively about the 14(c) program, the same as in FY 2016.<sup>239</sup> Since 2010, WHD has a dedicated staff person who organizes outreach contacts, however it is unclear how much of this staff

person's time is dedicated to outreach concerning the 14(c) program.

### ***Interagency Collaboration and Coordination***

In the investigation of TTP in Rhode Island, discussed previously, WHD also referred the situation to the DOJ's Civil Rights Division. DOJ investigated TTP and expanded its investigation to a nearby school-based sheltered workshop—the Harold Birch Vocational program. DOJ found that while employed by the school, students in the Birch program performed many of the same manual tasks during the school day that adults performed at TTP. Students were also referred to TTP without the opportunity for a meaningful or informed choice to work in integrated employment settings. DOJ found unnecessary segregation of adults and serious risks of unnecessary segregation of students in violation of the ADA and the U.S. Supreme Court *Olmstead* decision. As a result, DOJ obtained a court ordered settlement agreement with the State of Rhode Island and City of Providence.<sup>240</sup>

After a referral back from the DOJ, WHD investigated the Birch program, a 14(c) certificate holder, and found wage violations. WHD settled with the City of Providence, the Providence School Board, and Birch, which agreed to pay back wages to 60 student workers with disabilities.<sup>241</sup> WHD revoked Birch's 14(c) certificate, the second revocation following a WHD investigation and the first time for a school-based program.

In January 2017, WHD and the EEOC entered into a Memorandum of Understanding, discussed in Chapter 1. WHD does not track the number of referrals made to the EEOC for enforcement of employment discrimination complaints. WHD staff report a close working

relationship with the Rehabilitation Services Administration (RSA) of the U.S. Department of Education to implement and enforce Section 511 requirements. RSA maintains exclusive authority over provisions in Section 511 that proscribe contracts between schools and 14(c) certificate holders.<sup>242</sup> WHD also does not track the number of referrals made to RSA related to Section 511.

### ***Technical Assistance and Training***

Since 2011, WHD has annually offered five day-long seminars across the country open to the public about the requirements of the 14(c) program. Participants are trained on the 14(c) certificate process, how to perform prevailing wage surveys and time studies, and about common compliance problems.

WHD trains its staff about section 14(c), including Division investigators, through a module that is a piece of the basic training curriculum given to new investigators on all laws the Division enforces. Portions of the 14(c) training module have been updated to include information about Section 511 and other legal changes and the interplay between the ADA and the 14(c) program. WHD also conducts a three-day specialized training program on 14(c) enforcement available to all investigators, but it is not a mandatory requirement. WHD leverages regional specialists who have experience in 14(c) enforcement to provide assistance to less experienced investigators in their region conducting a 14(c) investigation.

### ***Adequacy of Agency Resources***

WHD's budget has not kept pace with the rapid developments over the past eight years in law and policy directly impacting the 14(c)

program. In a span of only two years, WHD's responsibilities for enforcement of the 14(c) program expanded with the added responsibility under WIOA and revisions to the Rehabilitation Act of 1973 and Executive Order 13658. WHD did not receive any significant expansion of its budget or resources necessary for additional staff or training on the new requirements (see Table F in Appendix A). Appropriations cover all laws enforced by WHD and are not broken down by individual areas of responsibility, precluding the ability to report with any accuracy funds dedicated to Section 14(c) enforcement.

WHD does not have staff specifically dedicated to 14(c) enforcement. Rather, as of December 2017,

it maintained 880 investigators who serve as generalists—trained to enforce numerous laws and regulations and who, depending on the circumstances, may become involved in 14(c) investigations.<sup>243</sup>

Nevertheless, the amount of staff time spent on 14(c) investigations is not publicly available, while the total number of 14(c) investigations is fairly consistent and the process by which investigators receive training about 14(c) is not effective to build expertise. **NCD recommends WHD take steps to increase the percentage of investigators trained for, and solely dedicated to, the enforcement of Section 14(c).**

### ***Overview of the Family and Medical Leave Act (FMLA)***

FMLA allows eligible employees to take up to 12 workweeks of leave in a 12-month period for, among other things, “a serious health condition

that makes the employee unable to perform the essential functions of his or her job.”<sup>244</sup> For some workers with disabilities, the right to FMLA leave and the possibility of leave as a reasonable accommodation under the ADA are significant factors in expanding employment opportunities. An employee may file a complaint with WHD to investigate an alleged FMLA violation or file suit directly in federal court without first seeking a WHD investigation.<sup>245</sup>

### ***Regulatory, Sub-Regulatory, and Policy Guidance***

WHD published final updated FMLA regulations in recent years including in 2008, 2013, and 2015. In particular, in 2008, WHD implemented

military family leave provisions pursuant to the FY 2008 National Defense Authorization Act (NDAA), and made substantive regulatory changes based on feedback

from employees, employers, other interested parties, and WHD enforcement experience and in response to litigation since 1993.<sup>246</sup> In 2013, WHD implemented further amendments to military family leave provisions and revised the calculation of eligibility and leave requirements for airline flight crews in response to congressional action. In 2015, WHD revised the regulatory definition of “spouse” under the FMLA following the U.S. Supreme Court’s decision in *United States v. Windsor*.

### ***Competent and Credible Investigative Process and Enforcement Action***

WHD accepts and investigates complaints and allegations of FMLA violations by both

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***WHD does not have staff specifically dedicated to 14(c) enforcement. Rather, as of December 2017, it maintained 880 investigators who serve as generalists . . .***

employees and third parties with credible information. In addition to complaints, WHD selects certain types of businesses or industries for directed investigations under FMLA. It appears that the percentage of complaint-initiated FMLA investigations has remained somewhat consistent over time, with approximately half of investigations being complaint initiated, and, by implication, half WHD directed.<sup>247</sup>

When an investigation uncovers an FMLA violation, WHD staff state that the DOL makes every effort to resolve most compliance issues administratively. If appropriate, DOL may litigate and/or recommend criminal prosecution. WHD may supervise the payment of unpaid compensation owed to any employee and to oversee the steps needed to remedy harm

to individuals. Instead of litigation, WHD may seek back wages, liquidated damages, and other remedies through settlements with employers. Civil money penalties may be assessed for failure to post the required FMLA notice.<sup>248</sup>

WHD uses a variety of performance measures to gauge the effectiveness (and timeliness) of its FMLA enforcement efforts.

*Over the past decade, the total number of FMLA cases investigated by WHD has declined by more than a third, dropping from 2,157 FMLA cases in 2008 to 1,353 cases in 2017.*

Over the past decade, the total number of FMLA cases investigated by WHD has declined by more than a third, dropping from 2,157

FMLA cases in 2008 to 1,353 cases in 2017. Overall, more than half of all FMLA cases investigated have resulted in a DOL finding that the law has been violated. Moreover, in the past five years, this rate has increased, as WHD has found violations in an average of 65 percent of

**Table 5: FMLA Cases Filed with WHD**

Fiscal Year	Number of FMLA Cases	Number of FMLA Cases with Violations
2008	2,157	1,106
2009	1,913	1,054
2010	2,189	1,069
2011	2,294	1,174
2012	1,915	1,083
2013	1,817	1,097
2014	1,703	1,055
2015	1,680	1,118
2016	1,448	980
2017	1,353	931

Data Source: WHD

cases. Table 5 contains the number of cases initiated under the FMLA and the number of cases with violations. **NCD recommends WHD undertake a systemic look at the reasons for the increase in FMLA violations, with an emphasis on whether an increase in agency-initiated investigations is warranted.**

DOL may file a lawsuit in U.S. district court on behalf of employees for back wages and an equal amount in liquidated damages. DOL may seek a court injunction to stop FMLA violations, including unlawful retaliation against employees who file complaints or cooperate with DOL. If an employee files a private suit in court seeking back pay, an equal amount in liquidated damages, and/or other appropriate remedies, DOL will not seek the same remedies on that employee's behalf.

### ***Technical Assistance and Training***

WHD has published more than 30 materials or pieces of guidance relating to FMLA since 2008. These include nearly 20 fact sheets, a

plain-language Employee Guide for workers and their families, a comprehensive Employer Guide for leave administrators, and updated FAQs.

WHD receives significant inquiries for technical assistance and outreach about the FMLA, and local offices receive and respond to numerous telephone inquiries daily on the law. According

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*Over a six-month period in FY 2017, the FMLA main page was visited more than half a million times.*

to agency staff, WHD's FMLA webpages, which contain many compliance-assistance materials, are often the

most visited on WHD website, and the FMLA webpages are consistently listed among the most visited pages on the DOL website as a whole. Over a six-month period in FY 2017, the FMLA main page was visited more than half a million times.

WHD conducts outreach at events across the country on the FMLA. In addition, FMLA information is provided in almost all outreach events with the public. WHD partners with the Employment Benefits Standards Administration to address the FMLA at their health benefits education campaign events (approximately 5–10 held annually).





## Chapter 3: U.S. Access Board

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The Access Board is a leading source of accessible design information with an oversight role in the Architectural Barriers Act (ABA). The work of the Access Board, however, is hampered by slow and restrictive

rulemaking processes, untimely resolution of complaints, failure to exercise its authority to initiate investigations based on noncompliance information, and limited resources to pursue critical goals and objectives.

### **Based upon the analysis in this chapter, NCD recommends that the Access Board:**

- Explore methods to expedite development of guidelines and standards, particularly on subjects that involve technology, so regulations are timely.
- Use its citation process to ensure that investigations are completed within 180 days and extend beyond the 180-day time limit only in the rarest circumstances.
- Publicize select investigation and compliance results.
- Ensure that the Frontiers Committee is maintained and empowered to keep abreast of emerging disability issues and accessibility developments and to shape the Access Board's regulatory and research agendas.
- Use data on types of facilities or geographic areas that give rise to the most complaints as a basis to identify types of facilities or geographic areas for self-initiated investigations under the ABA.
- Partner with other federal agencies that conduct nationwide enforcement of standards that are based on the ABA standards as detailed further in this chapter.
- After receipt of a complaint about a particular area of a covered facility, investigate the entire facility to avoid the need for follow-up complaints.
- Inform complainants of their right to demand a citation, or written reason for not issuing a citation, after 190 days from submission of the complaint if a corrective action plan is not completed.

NCD recommendations for Congress, the President, the Office of Management and Budget, and the Government Accountability Office related to the Access Board are contained in the text that follows.

### ***Overview of the Access Board***

The Access Board is an independent federal agency that promotes equality for people with disabilities through leadership in accessible design and development of accessibility standards. Its mission is to promote accessibility through standards and guidelines, education, enforcement, and outreach. The Access Board develops design criteria for the built environment, transportation vehicles, telecommunications equipment, medical equipment, and information technology. The agency also provides technical assistance and training on these requirements.<sup>249</sup>

The Access Board's oversight role under the ABA was established after Congress found inadequate ABA compliance.<sup>250</sup> The ABA was the first federal law to address accessibility and requires federal facilities designed, built, or altered by the Federal Government or with federal dollars, or leased by federal agencies, to be accessible.<sup>251</sup> As originally written 50 years ago, federal agencies subject to the ABA were to self-monitor and self-enforce the requirements. In 1975, the U.S. Government Accounting Office, now the Government Accountability Office (GAO), found that the ABA "had only a minor effect on making public buildings barrier free."<sup>252</sup> The GAO determined that a significant deficiency in the ABA was that it left implementation to the discretion of the regulated agencies,<sup>253</sup> and concluded that Access Board oversight was needed.<sup>254</sup>

The Access Board began work in 1975, was authorized by Congress to establish ABA accessibility guidelines in 1978, and issued the first guidelines in 1982.

### ***Regulatory, Policy, and Sub-Regulatory Guidance***

The Access Board establishes regulatory priorities based on legislative mandates and public input. The Access Board identifies issues for policy and sub-regulatory guidance primarily through public engagement; town hall meetings and other forums; technical assistance (TA) questions; and comments received in rulemaking. To further public involvement, the Access Board convenes advisory committees to assist in establishing regulatory priorities and to make technical recommendations for new or updated rules.<sup>255</sup>

When the ADA was enacted, the Access Board was further charged with developing accessibility guidelines. The ADA Accessibility Guidelines (ADAAG) were issued in 1991 and adopted by DOJ and DOT. The guidelines have been updated over the years to cover automated teller machines, judicial and correctional facilities, over-the-road buses, play areas, and recreational facilities. In 1996, the Access Board was given responsibility to address the accessibility of telecommunications equipment under the Telecommunications Act and issued guidelines in 1998. In 2010, the Affordable Care Act authorized the Board to develop standards for medical diagnostic equipment.<sup>256</sup>

The Access Board has moved two major actions—Accessibility Guidelines for Passenger Vessels and Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way—to

## Access Board's Planned 2018–2019 Regulatory Agenda

For 2018–2019, the Access Board plans to issue one final regulation and one advance notice of proposed rulemaking.<sup>257</sup>

- A final rule to make a technical correction to its information and communication technology regulation under Section 508 of the Rehabilitation Act (completed in January 2018); and
- Advance notice of proposed rulemaking to revise and update rail transportation vehicle guidelines—e.g., rapid, light, commuter, and intercity rail systems.

the Long Term Agenda.<sup>258</sup>

The Passenger Vessels rule has been on the Access Board's agenda since 1998 and been the subject of

an advanced notice and a notice of proposed rulemaking.<sup>259</sup> The Pedestrian Facilities rulemaking has been on the Access Board's agenda since

1999 and been the subject

of two notices of proposed rulemaking.<sup>260</sup> In its Fall

2016 agenda, the Board expected to issue final rules in 2018 and 2019. The

indefinite delay is likely a result of Executive Order (EO) 13771, which requires that a federal department

or agency identify at least two regulations to rescind for every new regulation.<sup>261</sup>

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*The Access Board has limited its research . . . because of budget constraints.*

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*The Access Board's limited resources, together with its collaborative and consensus-based rulemaking process, has resulted in a nearly 20-year process for the development of important regulations . . .*

Since 2008, the Access Board has had an extensive research agenda, completing research on Accessible Pedestrian Signals; Dimensional Tolerances; Exhibit Design; Anthropometry of Wheeled Mobility; Independent Transfers from Wheelchairs; Playground Surfaces; Surface Roughness Standards; and Trail Surfaces. The Access Board has two ongoing research projects: (1) Medical Diagnostic Equipment Minimum Transfer Height Phase II, and (2) WCAG 2.0 Expanded Online Technical Assistance.<sup>262</sup> The Access Board has limited its research agenda to upcoming regulations on accessibility of self-service transaction machines and accessibility of information technology to people with low vision and cognitive disabilities because of budget constraints.

The Access Board's limited resources, together with its collaborative and consensus-

based rulemaking process, has resulted in a nearly 20-year process for the development of important regulations that

industries and people with disabilities need to implement consistent, effective, and efficient access. The rules are now delayed further by

EO 13771. The Access

Board's rulemaking efforts are essential to the development of enforceable standards under the ADA and ABA, as well as Section 508.

Particularly in an era of exponential developments in technology and

accessibility, the Access Board needs to be able to complete its research, gather information and

input from stakeholders, and issue guidelines or standards in a timely manner. **NCD recommends the Access Board explore methods to expedite the development of guidelines and standards, particularly on subjects that involve technology, so that regulations are timely.**

**NCD recommends that the Director of the Office of Management and Budget exempt the Access Board from Executive Order 13771, pursuant to section 4(c) of the Executive Order, to allow the Access Board to proceed expeditiously with long-awaited rulemaking processes that are nearing completion.**

Section 508 of the Rehabilitation Act requires information and communication technology purchased, developed, or used by federal agencies to be accessible. In 1998, Congress assigned the Access Board responsibility to develop accessibility compliance standards for electronic and information technology, which the Board issued in 2000 and updated in 2017. Unlike the ABA, however, Section 508 does not explicitly provide an enforcement role for the Access Board. As a result, implementation of Section 508, like the original ABA, relies primarily on self-enforcement by the federal agencies and lawsuits by individuals with disabilities.

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*. . . Section 508 does not explicitly provide an enforcement role for the Access Board. As a result, implementation of Section 508 . . . relies primarily on self-enforcement by the federal agencies and lawsuits by individuals with disabilities.*

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*The lack of transparency, along with no federal agency authorized to require Section 508 compliance, makes it difficult to determine the impact or effectiveness of Section 508.*

There is virtually no transparency into the level of Section 508 compliance of federal electronic and information technology, or the number of complaints received or resolved. Agencies submit biannual reports to the Chief Information Officer Council's Accessibility Community of Practice.<sup>263</sup> Those reports are used for interagency analysis, trending, and planning to improve collaboration,

reduce redundancies, and develop solutions and recommendations for improving Section 508 management across the Federal Government. Those reports, however, are not publicly available. Section 508 also directs DOJ to conduct a biennial survey and issue a report

on federal compliance,<sup>264</sup> which were published in 2000, 2004, and 2012.<sup>265</sup> Those reports do not provide agency-specific information, the types

of technologies that are inaccessible, or an independent assessment of the accessibility of federal agencies' technology. Rather, the surveys focus on the levels of policies, training, spending, and infrastructure

dedicated to technology accessibility. The lack of transparency, along with no federal agency authorized to require Section 508 compliance, makes it difficult to determine the impact or effectiveness of Section 508. **NCD recommends that the Government Accountability Office conduct accessibility audits of websites,**

**online technologies, and other electronic and information technologies developed, procured, maintained, or used by federal agencies and make recommendations regarding implementation, oversight, and enforcement of Section 508.**

Under Section 508, the Federal Acquisition Regulatory Council (FAR Council) is required to incorporate the revised 508 Standards into the Federal Acquisition Regulations (FAR) “not later than 6 months after the Access Board publishes the

standards.”<sup>266</sup> Although the updated Section 508 standards were issued by the Access Board in 2017, the FAR has not been updated, and federal agencies’ procurements are still using the out-of-date standards. **NCD recommends that Congress and the President require the Federal Acquisition Regulatory Council (FAR Council) to immediately incorporate the revised Section 508 standards into the FAR.**

***Proactive and Reactive Strategies***

The Access Board’s proactive research and regulatory work is guided by several committees. The Access Board’s Planning and Evaluation Committee establishes goals and objectives to ensure overall program responsiveness and effectiveness, the Technical Programs Committee establishes research priorities to support current and future rulemaking efforts, and the Frontiers Ad Hoc Committee monitors

and evaluates advances in technology to shape priorities so that guidelines and TA continue to address relevant issues. These committees keep abreast of emerging issues and accessibility developments and shape the Access Board’s research and regulatory agendas accordingly.

**NCD recommends the Access Board ensure that the Frontiers Committee, which is**

**currently an ad hoc committee, is maintained and empowered to keep abreast of emerging disability issues and accessibility developments and to shape the Board’s**

**regulatory and research agendas.**

The enforcement efforts of the Access Board, however, is largely reactive. The Access Board has limited resources and only two full-time staff assigned to handle ABA complaints. Enforcement priorities and strategies are not established beforehand. Although the Access Board has

authority to survey facilities and initiate investigations in the absence of a complaint,<sup>267</sup> investigations are initiated solely in response to complaints. With limited travel funds and staff located only

in Washington, DC, the Access Board relies primarily on written correspondence and photos to collect necessary information and does not generally conduct compliance reviews. As a result, the Access Board’s ability to address additional violations at a facility beyond the particular element complained of is limited. Interested parties have noted that sometimes

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*The Access Board has limited resources and only two full-time staff assigned to handle ABA complaints.*

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*[T]he Access Board relies primarily on written correspondence and photos to collect necessary information and does not generally conduct compliance reviews.*

they must file multiple complaints and await the outcomes of multiple investigations regarding a single facility, because as one barrier is removed, the complainant discovers more barriers requiring additional complaints. This is an inefficient process and leads to multiple barriers at a single facility having to be investigated and remediated separately. **NCD recommends that when the Access Board receives a complaint about a particular area of a covered facility, it investigates the entire facility to avoid the need for follow-up complaints.**

**NCD recommends the Access Board use data on types of facilities or geographic areas that give rise to the most complaints as a basis to identify types of facilities or geographic areas for self-initiated ABA investigations.**

*From FY 2008 through FY 2017, the Access Board received a total of 1,309 ABA complaints (0.1 percent of GSA properties) and opened 532 investigations.*

### **Competent and Credible Investigative Process and Enforcement Action**

The Access Board receives ABA complaints through its online complaint form (95 percent of complaints are received in this manner), emails to an enforcement email address, fax, and mail. Complaints to the Access Board concern post

offices, national parks, military facilities, veterans' hospitals, courthouses, and other facilities.

According to the General Services Administration, in 2016 there were approximately 267,000 federally owned or leased buildings in the United States, plus 496,000 other federal property and structures (e.g., parking lots).<sup>268</sup> From FY 2008 through FY 2017, the Access Board received a total of 1,309 ABA complaints (0.1 percent of GSA properties) and opened 532 investigations.

Table 6 contains the number of complaints

received per year by the Access Board from FY 2008 to FY 2017 and the number of investigations opened by the Board.

Approximately 64 percent, or 345 out of 535, of the Access

Board's closed complaints involved completed corrective action by agencies, while the other 36 percent were closed based on a determination that the buildings were not covered or that the allegations did not amount to a violation of the standards. The Access Board's ABA enforcement regulations incorporate a policy of amicable resolution and explicitly "encourage voluntary and informal resolution of all complaints."<sup>269</sup>

The regulations permit the Access Board to investigate both complaints and violations coming

**Table 6: Access Board Investigations**

Fiscal Year	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Complaints received	210	111	89	161	120	92	104	131	134	157
Investigations opened	53	51	52	76	60	37	38	48	42	75

Date Source: Access Board

to its attention through other means.<sup>270</sup> The Access Board is required to hold the identities of complainants in confidence.<sup>271</sup>

If a complaint deals with accessibility of federal facilities, the Access Board's staff determine whether the facility is covered by the ABA by informing the respondent agency about the complaint, and asking about when the facility was constructed, altered, or leased, and if and how federal funds were used. If the facility is not covered by the ABA, the matter is closed. If the facility is covered, staff determine the applicable standard and verify whether the facility meets the standard. If the facility does not meet the applicable standard, the Access Board works with the agency to develop a plan to bring the facility into compliance and continues its investigation until the corrective action is completed.<sup>272</sup>

The Access Board has a 100 percent compliance rate where corrective action is required. If an agency were to refuse to comply, the Access Board would use informal mechanisms to reach out to the appropriate federal Access Board member and/or to the agency head to enlist their assistance in obtaining full compliance.<sup>273</sup> Despite these good results, there is an apparent lack of awareness within the disability community of the outcomes of the Access Board's investigations and compliance efforts, which may explain the relatively small number of complaints the Access

Board receives each year. One focus group participant discussed how she found that the local EEOC office bathroom was inaccessible, had complained to the EEOC, and was not aware of the enforcement role of the Access Board.

**NCD recommends the Access Board publicize select investigations and compliance results to draw attention to the effectiveness of the Board's processes and encourage the public to bring accessibility barriers to the Board's attention.**

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*The Access Board has a 100 percent compliance rate where corrective action is required. . . . Despite these good results, there is an apparent lack of awareness within the disability community of the outcomes of the Access Board's investigations and compliance efforts.*

The Access Board's administrative process stresses voluntary compliance. The Access Board's enforcement regulations authorize it to issue a written citation in the event of noncompliance that cannot be corrected by informal means, "requesting or ordering the relief necessary

to ensure compliance."<sup>274</sup> The citation must be filed with an Administrative Law Judge (ALJ) and served on all interested parties, including the complainant, and provide the basis for the imposition of the requested sanctions.<sup>275</sup> A respondent must answer within 15 days.<sup>276</sup> Complainants are not parties to proceedings by the Access Board, but may petition to participate in the proceeding.<sup>277</sup> An order of compliance issued by the ALJ is a final order for purposes of judicial review, is binding on the respondent agency, and may require withholding or suspension of federal funds for any facility found noncompliant with ABA standards.<sup>278</sup> A complainant who is dissatisfied with an order

may obtain review in a U.S. district court.<sup>279</sup> The Access Board is also authorized to bring a civil action to enforce a final order, to intervene, or to appear through a friend of the court (amicus) brief in any civil actions that relates to the ABA.<sup>280</sup>

### ***Timely Resolution of Complaints***

The Access Board's regulations call for matters to be resolved within 180 days.<sup>281</sup> For complaints resulting in referrals or determinations where the Board lacks jurisdiction or where no violations exist, according to the Board matters are usually handled within 14 days.

The Access Board's regulations require the Executive Director, within 10 days after the passage of 180 days, to either issue a citation or determine in writing that a citation will not be issued and provide the reasons.<sup>282</sup> Any time after the expiration of 190 days, a complainant or respondent agency may demand that the Access Board issue a citation and the Board must respond in writing within 30 days.<sup>283</sup> The letters the Access Board sends to complainants, however, do not advise them of their right to demand a citation after 190 days.<sup>284</sup>

For matters that the Access Board opens and investigates, based on its data, the percentage of investigations taking longer than 180 days steadily declined from 68 percent in FY 2012 to 44 percent in FY 2017. Nearly half of all investigations the Access Board conducts, however, take longer than 180 days. The Access Board's small budget is insufficient to allow investigators to travel to facilities outside the Washington, DC, metropolitan area, forcing the Board to rely on the investigated agencies to provide information, which has resulted in many investigations exceeding the 180-day deadline for completion.<sup>285</sup> One focus group participant

who filed several complaints with the Access Board reported that the investigations take a very long time to resolve. **NCD recommends the Access Board use its citation process to ensure that investigations are completed within 180 days and extend only in the rarest circumstances beyond the mandatory 180-day time limit.**

### ***Communications with Complainants and the Community***

After filing a complaint, within three business days a complainant will receive an email or letter with a complaint number, links to information about how the Access Board will handle the complaint, and the Board's compliance and enforcement regulations. If the Access Board opens an investigation but determines it lacks jurisdiction or that the allegations do not violate applicable accessibility standards, complainants are informed via email or letter. A complainant is given 15 days to provide information challenging the Access Board's determination. These determinations are usually made within the first two months after a complaint filing. If the Access Board has jurisdiction and a violation exists, the Board requires corrective action. Complainants are informed once a corrective action plan is put in place and are given periodic updates on the plan until its completion. Once the Access Board receives evidence of completion of the corrective action, complainants are informed and given 15 days to provide information challenging the Board's determination that the work has been completed.<sup>286</sup> **NCD recommends the Access Board inform complainants of their right to demand a citation, or written reason for not issuing a citation, after 190 days from**



**submission of the complaint if a corrective action plan is not completed.**

### ***Interagency Collaboration and Coordination***

The Access Board functions as a coordinating body among federal agencies and to directly represents the public, particularly people with disabilities. Twelve Access Board members are representatives from federal agencies (five are currently vacant).<sup>287</sup> Thirteen others are public members appointed by the President, a majority of whom must have a disability. The Access Board meets six times a year, which provides multiple opportunities for close collaboration. Additionally, Access Board staff host a monthly informal meeting of federal agency staff who work on disability-related issues to share information and collaborate on cross-cutting topics.

By regulation and design, the Access Board's enforcement process is intended to be an amicable, nonadversarial process based on cooperation. In order to make this process effective, the Access Board maintains strong relationships and open channels of communication with ABA standard-setting agencies and other federal agencies<sup>288</sup> and works to create a climate in which federal agencies know that voluntary compliance is beneficial.<sup>289</sup> In addition, the Access Board's Office of Technical and Information Services has accessibility specialists on staff who can provide technical assistance to agencies seeking to remediate accessibility barriers.<sup>290</sup>

**NCD recommends the Access Board partner**

**with other federal agencies that conduct nationwide enforcement of standards based on the ABA standards, such as the Departments of Justice, Transportation, and Housing and Urban Development. These agencies' regional or traveling staff may be able to visit facilities that are subjects of investigations to leverage the Access Board's limited resources.**

### ***Training and Technical Assistance***

The Access Board maintains a vigorous TA program. Federal agencies and members of the public can pose technical questions directly to Access Board staff using email, fax, or telephone. Because the same staff

that responds to such questions also develops guidelines, standards, and TA and training materials, customers receive reliable responses. Board staff use the questions to

develop TA materials and, when possible, to update its guidelines.<sup>291</sup>

On request, the Access Board provides in-person accessibility training nationwide to federal and state agencies, professional organizations, disability rights organizations, manufacturers, and others. The Access Board also conducts two webinar series—one focused on accessible buildings and facilities (12 per year) and the other on accessible information and communication technology (6 per year). Inquiries received during training sessions also inform the Access Board's TA efforts.<sup>292</sup> The Access Board provides training and TA on the ABA and has offered four webinars on the



ABA and will be offering another in 2018.<sup>293</sup> The Access Board also informs the public about ABA enforcement and sub-regulatory guidance through its website, which logged more than 1.35 million unique visitors in FY 2017,<sup>294</sup> an email newsletter with almost 30,000 subscribers, Twitter, a recently created YouTube channel, and public events such as town hall meetings and targeted outreach. The Access Board assesses the effectiveness of its guidance through analysis of website traffic; email distribution-system reporting on sent messages; and feedback from the public and stakeholders at meetings, training sessions, targeted outreach, and other venues.

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*The Access Board also informs the public about ABA enforcement and sub-regulatory guidance through its website, which logged more than 1.35 million unique visitors in FY 2017.*

### ***Adequacy of Agency Resources***

The Access Board's FY 2018 budget is approximately \$8 million and has grown by about \$100,000 per budget year. Access Board personnel expenses are approximately

\$5.15 million, or 62 percent of its budget, and historically, the Board has requested a research budget of approximately \$400,000. In FY 2018, only \$100,000, or approximately 1 percent of the budget, is

allocated to research despite the fact that the Access Board's research relates to rulemaking. Mandatory expenses, such as personnel and required information technology, account

for the low research allocation and negative impact funds available for critical programs.<sup>295</sup>

In particular, required information technology expenses have grown tremendously, rising from \$695,700 (8.6 percent of budget) in FY 2017 to \$1.15 million (14 percent) in FY 2018.<sup>296</sup> **NCD recommends**

**that Congress and the President approve an increase to the Access Board's budget,**

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*In FY 2018, only \$100,000, or approximately 1 percent of the budget, is allocated to research despite the fact that the Access Board's research relates to rulemaking.*

**particularly its budget for contracts, to address its added responsibilities,**

**to support a robust and timely research program to support its rulemaking, and to allow staff to travel to inspect facilities beyond the metropolitan Washington, DC, area**

**when those facilities are the subjects of ABA investigations.**



## Conclusion: Has the Promise Been Kept?

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This report asked the question, Has the promise of federal disability rights laws been kept? As with other civil rights laws, the attempt to achieve the promise is a difficult and ongoing process. New and sometimes unforeseen social, technological, physical, and legal barriers arise that must be addressed through education, policy changes, legislation, administrative enforcement, and litigation.

Since *Promises to Keep* was released in 2000, progress in disability rights compliance has occurred for people with disabilities, but the overall results are mixed.

Similar to the findings in *Promises to Keep*, “underfunding” and, more critically, understaffing are significant concerns to the rigorous enforcement of federal disability civil rights laws.<sup>297</sup> In many years, the EEOC failed to achieve targeted employment levels, which the agency suggested was the result of a number of external factors. The OFCCP is in the midst of a staffing decline as it seeks to rebalance its compliance reviews in response to recommendations from the GAO. While the agencies themselves have certain control over staffing and the internal allocation of resources, and need to make direct enforcement activities a priority, Congress and the President have an important role in assisting the agencies with this process. Elimination of barriers to hiring and ensuring adequate funding

for staffing and personnel requirements are central to maintaining and improving disability rights enforcement. **NCD recommends that Congress and the President provide sufficient resources, and remove personnel barriers, which hamper the disability civil rights enforcement activities of the federal agencies.**

This report has pointed to the positive impact of the ADAAA upon the enforcement efforts of the EEOC. The EEOC took advantage of the ADAAA to significantly increase ADA enforcement litigation in the federal courts, and to strengthen the ADA Title I regulations. The now judicially overturned voluntary wellness program rule, however, is an important exception to the improved EEOC leadership. The EEOC’s re-interpretation of the ADA confidentiality provisions to the detriment of people with disabilities harkens back to NCD’s finding in *Promises to Keep* that the EEOC fails to always interpret the ADA to the maximum extent possible to ensure inclusion of people with disabilities.<sup>298</sup> Further protections are also necessary to ensure that the EEOC’s charge filing and investigative procedures account for disability issues, as well as to improve communications with people of all types of disabilities.

As for the Department of Labor, ODEP supports numerous programs to encourage and support the recruitment, hiring, advancement,

and retention of workers with disabilities. ODEP, however, has little authority to insist on cooperation from other federal agencies and has difficulty in measuring the outcome of its efforts. OFCCP updated the Section 503 regulations to, for the first time, set aspirational goals for hiring people with disabilities by federal contractors and to improve the collection of data on the effectiveness of affirmative action efforts. OFCCP, however, failed to adopt a number of regulatory provisions that would have advanced the impact of affirmative action and antidiscrimination policies for people with disabilities after concerns were raised by contractors over potential burdens. WHD has slowly, but gradually, engaged in more aggressive enforcement activities, revoking at least four

14(c) certificates in the past several years, after having never revoked a certificate as part of an enforcement action in the history of the program.

In 2011, WHD used targeted enforcement to improve and better assess Section 14(c) enforcement efforts, but WHD still maintains a very outdated application and data-tracking system for the 14(c) program.

The federal enforcement agencies still rely largely on complaint-driven enforcement rather than a comprehensive strategy in the selection of compliance reviews. This is especially the case for OFCCP, WHD, and the Access Board, which have the ability to initiate reviews without the need for a complaint. The Access Board has a long history of solid regulatory and research work, including the identification of emerging issues, but does not undertake Board-initiated investigations that could broaden the impact of

its work. With the exception of the EEOC Office of Legal Counsel, none of the agencies considers enforcement staff specially trained in disability issues as a proper use of resources. NCD believes this should be addressed.

In *Promises to Keep*, NCD found that “[t]he record so far shows variation in the degree to which the federal agencies have shown leadership, engaged in policy development, and sought to clarify ‘frontier issues.’ Some of these differences appear to be related to the culture of the agency itself and how it has traditionally framed its mission and defined its constituency.”<sup>299</sup> This situation seems still to exist. OFCCP does not seem to clearly define its mission as rigorous enforcement to achieve affirmative action

outcomes for persons with disabilities but rather on encouraging voluntary compliance by federal contractors. NCD has concerns with how WHD allocates program

resources to oversee the implementation of the requirements of Section 511 of the WIOA, and the lack of information about, and risk to employees with disabilities, when a 14(c) certificate holder does not renew a certificate.

The nation cannot be content for full integration and equal rights for all people with disabilities to remain simply aspirational. Constant vigilance and diligent enforcement by the Federal Government is required for all people with disabilities to achieve equality, justice, and full community participation. Taking the proactive steps included in this Progress Report to improve the enforcement of federal disability rights laws will bring the nation closer to the full promise for people with disabilities.

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*The nation cannot be content for full integration and equal rights for all people with disabilities to remain simply aspirational.*

## Appendix A: Agency Budget and Staffing Charts

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**Table A: EEOC Annual Budget 2000 to 2017**

Fiscal Year	Enacted	Constant 2000 Dollars	Yearly % Change (Constant \$)
2000	\$280,928	\$280,928.00	
2001	\$303,195	\$294,806.21	4.94%
2002	\$310,406	\$297,120.14	0.78%
2003	\$321,815	\$301,176.86	1.37%
2004	\$324,944	\$296,216.82	-1.65%
2005	\$326,804	\$288,149.76	-2.72%
2006	\$326,883	\$279,212.56	-3.10%
2007	\$328,745	\$273,026.64	-2.22%
2008	\$329,300	\$263,375.15	-3.53%
2009	\$343,925	\$276,054.41	4.81%
2010	\$367,303	\$290,061.16	5.07%
2011	\$366,568	\$280,622.79	-3.25%
2012	\$360,000	\$270,007.06	-3.78%
2013	\$370,000	\$273,501.12	1.29%
2014	\$364,000	\$264,770.88	-3.19%
2015	\$364,500	\$264,820.24	0.02%
2016	\$364,500	\$261,521.12	-1.25%
2017	\$364,500	\$256,066.01	-2.09%
<b>Annual Average</b>	<b>\$339,906.44</b>	<b>\$278,413.16</b>	<b>1.58%</b>
<b>% Change Between 2000 &amp; 2017</b>			<b>-8.85%</b>

Enacted Budget Data Source: EEOC;<sup>300</sup> Constant dollar and year % changes are calculations of the researchers based on the Consumer Price Index (CPI) for each year utilizing 2000 as the base year.

**Table B: EEOC Staffing 2000 to 2017**

Fiscal Year	Approved FTE Ceiling	Actual End of Fiscal Year FTE	Yearly FTE Change	Yearly % Change
2000	2,946	2,852	N/A	N/A
2001	3,055	2,704	-148	-5.19%
2002	3,055	2,783	79	2.92%
2003	2,800	2,617	-166	-5.96%
2004	2,765	2,462	-155	-5.92%
2005	2,640	2,441	-21	-0.85%
2006	2,381	2,246	-195	-7.99%
2007	2,381	2,158	-88	-3.92%
2008	2,381	2,176	18	0.83%
2009	2,556	2,192	16	0.74%
2010	2,556	2,385	193	8.80%
2011	2,470	2,505	120	5.03%
2012	2,571	2,346	-159	-6.35%
2013	2,354	2,147	-199	-8.48%
2014	2,347	2,098	-49	-2.28%
2015	2,347	2,191	93	4.43%
2016	2,250*	2,202	11	0.50%
2017	2,347	2,082	-120	-5.45%
<b>Annual Average</b>		2,366		
<b>Change Between 2000 &amp; 2017</b>			-770	-27.00%

Data Source: EEOC;<sup>301</sup> Yearly change calculations by the researchers.

\*2,250 represents the revised actual within the FY 2016 Enacted Budget; 2,347 was the Commission's approved FTE Ceiling.



**Table C: ODEP Budget 2008 to 2016**

<b>Fiscal Year</b>	<b>Enacted (\$ in thousands)</b>	<b>Constant 2000 Dollars</b>	<b>Yearly % Change (Constant \$)</b>
<b>2008</b>	\$27,288.00	\$27,288.00	
<b>2009</b>	\$26,697.00	\$26,792.32	-1.82%
<b>2010</b>	\$39,031.00	\$38,538.23	43.84%
<b>2011</b>	\$38,953.00	\$37,284.32	-3.25%
<b>2012</b>	\$38,879.00	\$36,458.99	-2.21%
<b>2013</b>	\$36,846.00	\$34,053.73	-6.60%
<b>2014</b>	\$37,745.00	\$34,327.74	0.80%
<b>2015</b>	\$38,500.00	\$34,972.87	1.88%
<b>2016</b>	\$38,203.00	\$34,270.75	-2.01%
<b>Annual Average</b>	\$35,793.56	\$33,776.33	3.83%
<b>Change Between 2008 &amp; 2016</b>			25.59%

Data Source: ODEP FY 2018 Budget Justification.<sup>302</sup> Constant dollar and yearly % changes are calculations by the researchers based on the Consumer Price Index (CPI) for each year utilizing 2008 as the base year.

**Table D: OFCCP Budget 2004 to 2017**

Fiscal Year	Enacted (in Thousands)	Constant 2000 Dollars	Yearly % Change (Constant \$)
2004	\$79,442	\$79,442	
2005	\$80,060	\$77,436	-2.52%
2006	\$81,285	\$76,164	-1.64%
2007	\$82,441	\$75,108	-1.39%
2008	\$81,001	\$71,068	-5.38%
2009	\$82,107	\$72,295	1.73%
2010	\$105,386	\$91,295	26.28%
2011	\$105,386	\$88,501	-3.06%
2012	\$105,187	\$86,543	-2.21%
2013	\$99,685	\$80,832	-6.60%
2014	\$104,976	\$83,764	3.63%
2015	\$106,476	\$84,860	1.31%
2016	\$105,476	\$83,016	-2.17%
2017	\$104,476	\$80,514	-3.01%
<b>Annual Average</b>	\$94,527.43	\$80,774.30	0.38%
<b>Change Between 2004 &amp; 2017</b>			1.35%

Enacted Budget Data Source: OFCCP<sup>303</sup> Constant dollar and yearly % changes are calculations by the researchers based on the Consumer Price Index (CPI) for each year utilizing 2004 as the base year.

**Table E: OFCCP Staffing Levels 2004 to 2017**

<b>Fiscal Year</b>	<b>Actual End of Fiscal Year</b>	<b>Yearly FTE Change (Actual)</b>	<b>Yearly % Change</b>
<b>2004</b>	749		
<b>2005</b>	691	-58	-7.74%
<b>2006</b>	670	-21	-3.04%
<b>2007</b>	625	-45	-6.72%
<b>2008</b>	585	-40	-6.40%
<b>2009</b>	622	37	6.32%
<b>2010</b>	838	216	34.73%
<b>2011</b>	788	-50	-5.97%
<b>2012</b>	755	-33	-4.19%
<b>2013</b>	729	-26	-3.44%
<b>2014</b>	683	-46	-6.31%
<b>2015</b>	621	-62	-9.08%
<b>2016</b>	615	-6	-0.97%
<b>2017</b>	556	-59	-9.59%
<b>Annual Average</b>	529		
<b>Change Between 2004 &amp; 2017</b>		-193	-25.77%

Data Source: OFCCP;<sup>304</sup> Yearly change calculations by the researchers.

**Table F: WHD Budget 2008 to 2016**

Fiscal Year	Enacted (\$ in Thousands)	Constant 2000 Dollars	Yearly % Change (Constant \$)
2008	\$175,658.00	\$175,658.00	
2009	\$193,092.00	\$193,781.43	10.32%
2010	\$227,262.00	\$224,392.77	15.80%
2011	\$227,491.00	\$217,745.68	-2.96%
2012	\$227,061.00	\$212,927.67	-2.21%
2013	\$215,184.00	\$198,876.88	-6.60%
2014	\$224,330.00	\$204,020.18	2.59%
2015	\$227,500.00	\$206,657.89	1.29%
2016	\$227,500.00	\$204,083.35	-1.25%
<b>Annual Average</b>	\$216,119.78	\$204,238.20	2.12%
<b>% Change Between 2008 &amp; 2016</b>			16.18%

Data Source: WHD FY 2017 Budget Justification.<sup>305</sup> Constant dollar and yearly % changes are calculations of the researchers based on the Consumer Price Index (CPI) for each year utilizing 2008 as the base year.

## Appendix B: Federal Disability Civil Rights Laws Considered

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### **The Architectural Barriers Act of 1968**

The Architectural Barriers Act (ABA)<sup>306</sup> requires that buildings or facilities that were designed, built, or altered with federal dollars or leased by federal agencies after August 12, 1968, be accessible. Covering a wide range of government facilities, including U.S. post offices, Veterans Affairs medical facilities, national parks, Social Security Administration offices, federal office buildings, U.S. courthouses, and federal prisons, it also applies to nongovernment facilities that have received federal funding, such as schools, public housing, and mass transit systems. The ABA is enforced by the U.S. Architectural and Transportation Barriers Compliance Board (Access Board) through the investigation of complaints.

### **The Rehabilitation Act of 1973**

The Rehabilitation Act of 1973,<sup>307</sup> as amended, prohibits discrimination on the basis of disability in federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors. Several important sections of the Act include the following:

Section 501 prohibits federal agencies from discriminating in the hiring and employment of people with disabilities and requires the agencies to take affirmative action to hire, place, and advance employees with disabilities.<sup>308</sup>

Section 503 prohibits federal contractors and subcontractors from discriminating in employment against people with disabilities and requires these employers to take affirmative action to recruit, hire, promote, and retain employees with disabilities.

Section 504 mandates that no qualified individual with a disability shall be “excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” receiving federal financial assistance or conducted by a federal agency. Each federal agency establishes its own 504 regulations that apply to its programs and each federal agency is responsible for enforcing its own regulations. Requirements common to these regulations include reasonable accommodation for employees with disabilities; program accessibility; effective communication with people who have hearing or vision disabilities; and accessible new construction and alterations.

Section 508 establishes requirements for electronic and information technology developed, maintained, procured, or used by the Federal Government. Section 508 requires federal electronic and information technology to be accessible to people with disabilities, including employees and members of the public. “Section 508 was enacted to eliminate barriers in information technology, to make available new opportunities for people with disabilities and to encourage development of technologies that will help achieve these goals. Section 508 requires that when federal agencies develop, procure,

maintain, or use electronic and information technology, federal employees with disabilities have access to and use of information and data that is comparable to the access and use by federal employees who are not individuals with disabilities, unless an undue burden would be imposed on the agency. Section 508 also requires that individuals with disabilities, who are members of the public seeking information or services from a federal agency, have access to and use of information and data that is comparable to that provided to the public who are not individuals with disabilities, unless an undue burden would be imposed on the agency.”<sup>309</sup> Similar to Section 504, each federal agency is charged with establishing and enforcing its 508 criteria.

## **Americans with Disabilities Act**

The Americans with Disabilities Act (ADA)<sup>310</sup> of 1990 is heralded as the nation’s first comprehensive civil rights law addressing the needs of people with disabilities, prohibiting discrimination in employment, public services, public accommodations, and telecommunications. Modeled on the Civil Rights Act of 1964, the ADA gives recognition that discrimination based on disability is a violation of civil rights. The ADA affords protections to people with disabilities similar to those provided to people on the basis of race, color, sex, national origin, age, and religion, guaranteeing nondiscrimination on the basis of disability and equal opportunity in employment, state and local government services, transportation, public accommodations, and telecommunications.

Title I of the ADA prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments. The EEOC is charged with enforcement of Title I of the ADA.

Title II of the ADA protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by state and local government entities. Title II extends the prohibition on discrimination established by Section 504 of the Rehabilitation Act of 1973, as amended<sup>311</sup> to all activities of state and local governments regardless of whether these entities receive federal financial assistance. Except for matters involving public transportation services, the DOJ is responsible for enforcement activities related to Title II, generally through DOJ’s Civil Rights Division, Disability Rights Section. Compliance and enforcement of Title II provisions covering public transportation services, such as city buses and public rail transit (e.g., subways, and commuter rail), are directed to the Federal Transit Administration, Department of Transportation, Office of Civil Rights.

Title III of the ADA prohibits discrimination on the basis of disability in the activities of places of public accommodations, defined as businesses that are generally open to the public and that fall into one of 12 categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, and doctors’ offices. Public accommodations must comply with basic nondiscrimination requirements that prohibit exclusion, segregation, and unequal treatment. Places of public accommodation also must comply with specific requirements related to architectural standards for new and altered buildings; reasonable modifications to policies, practices, and procedures; effective

communication with people with hearing, vision, or speech disabilities; and other access requirements. Additionally, public accommodations must remove barriers in existing buildings where it is easy to do so without much difficulty or expense, given the public accommodation's resources. The Department of Justice is charged with enforcement of Title III.

The ADA Amendments Act of 2008<sup>312</sup> (ADAAA), removed a number of unintended barriers and roadblocks to coverage under the original ADA and nullified judicial misinterpretations of congressional intent. As described by the EEOC, the ADAAA:

emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis. The Act makes important changes to the definition of the term "disability" by rejecting the holdings in several U.S. Supreme Court decisions and portions of EEOC's ADA regulations. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.<sup>313</sup>

The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted and most significantly directs EEOC to revise that portion of its regulations defining the term "substantially limits"; expands the definition of "major life activities" by including two nonexhaustive lists; clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; changes the definition of "regarded as" so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead says that an applicant or employee is "regarded as" disabled if he or she is subject to an action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor).

## **Fair Labor Standards Act**

The Fair Labor Standards Act (FLSA),<sup>314</sup> enacted in 1938, establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in both the private sector and in federal, state, and local governments. The purpose of the FLSA was to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."<sup>315</sup>

## **Family and Medical Leave Act**

The Family and Medical Leave Act (FMLA)<sup>316</sup> of 1993, as amended, entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Eligible employees are entitled to 12 workweeks of leave in a

12-month period for (1) the birth of a child and to care for the newborn within a year of birth; (2) after placement of a child for adoption or foster care and to care for the newly placed child for one year from the placement; (3) to care for a spouse, child, or parent who has a serious health condition; (4) a serious health condition that makes the employee unable to perform the essential functions of his or her job; or (5) any “qualifying exigency” arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty.” The FMLA also provides for 26 workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member’s spouse, son, daughter, parent, or next of kin.

Section 105 of the FMLA expressly prohibits (1) an employer from interfering with, restraining, or denying the exercise of, or the attempt to exercise, any FMLA right; (2) an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise any FMLA right; (3) an employer from discharging or in any other way discriminating against any person, whether or not an employee, for opposing or complaining about any unlawful practice under the FMLA, or providing information or testifying in connection with an inquiry or proceeding related to a rights under the FMLA. The Act also prohibits all persons, whether or not employers, from discharging or in any other way discriminating against any person, whether or not an employee, because that person has filed any charge or has instituted, or caused to be instituted, any proceeding under or related to the FMLA.

Examples of prohibited conduct include refusing to authorize FMLA leave for an eligible employee; discouraging an employee from using FMLA leave; manipulating an employee’s work hours to avoid responsibilities under the FMLA; using an employee’s request for, or use of, FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions; or counting FMLA leave under “no fault” attendance policies.

## **Genetic Information Nondiscrimination Act**

The Genetic Information Nondiscrimination Act (GINA)<sup>317</sup> was signed into law on May 21, 2008, to protect people against discrimination based on their genetic information in health coverage and in employment. GINA is divided into two titles. Title I of GINA prohibits discrimination based on genetic information in health coverage, while Title II prohibits discrimination based on genetic information in employment. The Department of Health and Human Services’ Office of Civil Rights and Centers for Medicare and Medicaid Services, the Department of Labor, and the Department of the Treasury all have responsibility for issuing regulations under Title I of GINA to prohibit discrimination based on genetic information by group health plans and health insurance issuers. Health and Human Services also coordinated with the EEOC—which has responsibility for issuing regulations under Title II of GINA—to prohibit discrimination based on genetic information by employers.



## Workforce Innovation and Opportunities Act

Passage of the bipartisan Workforce Innovation and Opportunity Act (WIOA)<sup>318</sup> of 2014 has firmly established employment of people with disabilities as a national priority. Of significant importance to this report, section 511 of WIOA included specific new requirements prior to the payment of a subminimum wage under Section 14(c) of the FLSA. As the DOL states:

WIOA is a comprehensive federal law, enacted on July 22, 2014, which is intended to streamline, consolidate, and improve workforce development and training services for various groups, including youth and workers with disabilities. Among other things, WIOA prohibits workers with disabilities who are age 24 or younger (youth) from being paid subminimum wages without completing various requirements designed to improve their access to competitive integrated employment, including transition services, vocational rehabilitation and career counseling services, before they are employed at a subminimum wage. WIOA also requires that all workers with disabilities, regardless of their age, who are paid a subminimum wage, receive regular career counseling and information about self-advocacy, self-determination, and peer mentoring training opportunities in their local area, every six months during the first year of employment and annually thereafter. These requirements . . . are in addition to, and do not replace, requirements of Section 14(c) . . . .<sup>319</sup>



# Appendix C: Overview of *Promises to Keep* and Methodology Used for the 2018 Progress Report

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## **Overview of Promises to Keep**

*Promises to Keep* took an in-depth look at the EEOC, DOJ, DOT, FCC, and to a degree the Access Board, all of which have a role in the enforcement or implementation of the ADA. For that report, NCD researchers developed and used the following 11 elements to assess the ADA enforcement by those agencies:<sup>320</sup>

**Element 1:** Proactive and reactive strategies. Proactive measures address compliance through efforts to educate, monitor, and prevent civil rights violations, and reactive measures aim to resolve and remedy complaints of civil rights violations after the fact.

**Element 2:** Communication with consumers and complainants. Communication must ensure that persons protected by the statute know where and how to file complaints of discrimination, how the enforcement agency operates, what to expect as possible outcomes, and the aims and limits of the enforcement mandate. Complainants should hear promptly from the agency following the initial filing and be regularly updated on the status of the complaint.

**Element 3:** Policy and sub-regulatory guidance. Enforcement is advanced where agencies issue policy and sub-regulatory guidance on issues of confusion or controversy as a means of providing advice to covered entities about actions for compliance and to assist the courts in the interpretation of the statute.

**Element 4:** Enforcement actions. Where violations of the statute are present, effective enforcement involves measures to obtain corrective action or mediated settlement, followed by more punitive measures such as fines or litigation where violations are not easily or promptly resolved.

**Element 5:** Strategic litigation. Agency-initiated strategic litigation or amicus participation in litigation to implement enforcement is used where other measures have failed or to develop case law.

**Element 6:** Timely resolution of complaints. Effective resolution of complaints involves their timely processing. There should be expeditious internal processing where complaints must be referred to other agencies for investigation.

**Element 7:** Competent and credible investigative processes. Effective enforcement includes investigative processes and outcomes that are thorough, well documented, and competent and thus credible to complainants and covered entities alike.

**Element 8:** Technical assistance for protected persons and covered entities. Technical assistance, offered in a variety of modes and formats, helps covered entities and informs those protected by the statute of their rights.

**Element 9:** Adequate agency resources. Resources include agency staff (investigators, attorneys, and others) adequate in number to the size of the compliance and complaint caseload; ongoing staff training provided on a regular basis; and data management systems and other support systems to enable efficient implementation of enforcement activities.

**Element 10:** Interagency collaboration and coordination. Appropriate collaboration and coordination affect enforcement where responsibilities are spread across different agencies or organizations, or where there are related activities or areas of jurisdiction.

**Element 11:** Outreach and consultation with the community. Regular outreach and consultation with the communities of persons protected by the statutes provide information about the key issues and problem areas of enforcement, how effectiveness is judged by consumers, and potential methods for improvement.

*Promises to Keep* concluded that “the federal agencies charged with enforcement and policy development under the ADA, to varying degrees, have been overly cautious, reactive, and lacking any coherent and unifying national strategy,”<sup>321</sup> and that there existed “variation in the degree to which the federal agencies [had] shown leadership, engaged in policy development, and sought to clarify ‘frontier issues.’”<sup>322</sup> *Promises to Keep* went on to state that in some cases differences in agency leadership “appear to be related to the culture of the agency itself and how it has traditionally framed its mission and defined its constituency. In other cases, resource and administrative constraints, turf conflicts, and other forces within the agency appear to suppress or mute the rigor of civil rights enforcement.”<sup>323</sup>

*Promises to Keep* included 23 recommendations related to the EEOC<sup>324</sup> and three recommendations related to the Access Board.<sup>325</sup>

### ***Methodology Used for the 2018 Progress Report***

Looking back at *Promises to Keep*, while broadening the scope of the analysis, the primary question for the 2018 Progress Report was, How effective has the EEOC, DOL, and the Access Board been in the enforcement and implementation of federal laws that impact people with disabilities? To focus the analysis, the 11 elements developed in *Promises to Keep* were rephrased into 11 questions to guide the research. Researchers reviewed agency reports, strategic plans, regulations, and sub-regulatory guidance; evaluated agency budget and staffing data; analyzed enforcement statistics when available

and relevant; and examined agency involvement in administrative hearings and federal litigation, as relevant.

Agency budgets were analyzed to determine changes and the potential impact on the enforcement of disability rights and programs. Data on full-time equivalent (FTE) staff, when available, was assessed for significant changes.

For the EEOC, OFCCP, and WHD, data on complaints, investigations, and other enforcement information was analyzed. The EEOC provides significant data online and in agency reports charges, resolution, and EEOC litigation. OFCCP also publishes some data online,<sup>326</sup> and provided supplementary data to the researchers on violations found during compliance reviews and complaint investigations back to FY 2008. WHD provided information related to Section 14(c) applications and approval rates and investigations related to Section 14(c) and the FMLA.

Researchers interviewed and/or submitted written questions to agency leadership and staff. Specific interview questions, covering a range of issues, were developed based on the broader 11 research questions. A number of the interview questions for the EEOC were related to the recommendations contained in *Promises to Keep*. Relevant GAO reports were analyzed. Memoranda of Understanding between federal enforcement agencies, such as between the EEOC and DOJ, were also reviewed. Researchers reviewed major cases brought in the U.S. Circuit Courts of Appeal and the U.S. Supreme Court. Lower federal court cases were also considered when relevant. The analysis of amici curiae briefs submitted by the EEOC were further considered.

Though data and information were considered back to 2000, especially for the EEOC, the analyses for several other federal agencies focused on more recent efforts. To guide the research, a project advisory group of 10 experts in disability rights, disability research, and disability and self-advocacy was established that provided advice on specific research questions, research methods, assistance to conduct the focus groups, and ideas for the organization of the report and the recommendations.

### ***Focus Discussion Groups***

Four focus discussion groups of people with disabilities with prior interaction with the agencies under study were conducted in February and March 2018. Three of the focus groups were conducted remotely through phone and online video. Persons without video capability could participate solely by phone. A fourth focus discussion group occurred in Decatur, GA. Announcements and solicitations seeking participants were sent out repeatedly to numerous networks, including social media, used by, or associated with, the disability community and disability advocates.

A total of 23 people with disabilities participated, with 12 having engaged at some level in the EEOC charge process. Eleven participants had some engagement with the Access Board or ODEP. Of the 23 total participants, three had interacted with two of the agencies considered. Given the small number of focus group participants, generalizations, conclusions, or categorization of issues with broad applicability is not possible about enforcement or implementation efforts based on the responses.



## Appendix D: Reply of the Department of Labor’s Civil Rights Center to Research Questions

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### 1. What is CRC’s mission?

The mission of the Civil Rights Center (CRC) is to promote justice and equal opportunity by acting with impartiality and integrity in administering and enforcing various civil rights laws. These laws protect:

- Department of Labor (DOL) employees and applicants for DOL employment. These issues are handled by CRC’s internal program.
- Individuals who apply to, participate in, work for, or come into contact with programs and activities that are conducted by or receive financial assistance from DOL, or, under certain circumstances, from other Federal agencies. With regard to disability, CRC also has jurisdiction over complaints regarding programs, services, and regulatory activities relating to labor and the workforce that are operated by public entities. These issues are handled by CRC’s external program.

CRC carries out its mission by investigating and adjudicating discrimination complaints, conducting compliance reviews, providing technical assistance and training, and developing and publishing civil rights regulations, policies, and guidance.

The responses below relate to CRC’s external program unless indicated otherwise.

### 2. What is CRC’s process for compliance with section 508 of the Rehabilitation Act, especially in regard to agency websites?

CRC’s Office of External Enforcement (OEE) accepts complaints regarding compliance by DOL agencies with Section 508 of the Rehabilitation Act and handles them through its regular complaint process. Additionally, CRC representatives provide guidance, when requested, to other Departmental agencies on compliance with section 508, particularly as it relates to websites and other technology.

### 3. How is information provided in an accessible manner for charging parties or complainants with disabilities? How is information provided to the general public in an accessible manner, including when conducting training?

Under 29 CFR 38.35, recipients of Title I federal financial assistance are required to provide initial and continuing notice about equal opportunity requirements (“Equal Opportunity is the Law”) including providing effective communication (auxiliary aids and services) to registrants, applicants, and eligible applications/registrants, applicants for employment and employees and participants

with disabilities. CRC's website provides information to the general public about the agency's internal and external jurisdiction, including how to file a complaint directly with CRC by mail or electronically. CRC is working to improve the full accessibility of the website. CRC staff are required to include the number for the Federal Relay Service in their e-mail signatures and on all correspondence that includes a voice telephone number. CRC provides auxiliary aids and services upon request. CRC recently changed its website and intake letter to ensure that individuals with disabilities are aware of this availability and how to request it. CRC also provides training and technical assistance for stakeholders (see response to Q. #27 below).

4. What disability-related laws does CRC investigate?

CRC's external program investigates / implements the following laws:

- Title II of the Americans with Disabilities Act (ADA Title II), and its implementing regulations at 28 CFR Part 35.
- Section 504 of the Rehabilitation Act of 1973 (Section 504), and DOL's implementing regulations at 29 CFR Parts 32 and 33.
- Section 508 of the Rehabilitation Act of 1973 (Section 508).
- Section 188 of the Workforce Innovation and Opportunity Act (WIOA Section 188); its implementing regulations at 29 CFR Part 38; its predecessor, Section 188 of the Workforce Investment Act (WIA Section 188); and the regulations implementing WIA Section 188, at 29 CFR Part 37.
- Executive Order 13160, which prohibits discrimination on the basis of disability, among others, in federally-conducted education and training programs and activities.

5. What are the overall enforcement and investigatory outcomes of the CRC in regard to disability since 2008?

CRC maintains case records pursuant to DOL's record retention schedule; thus, we are able to highlight cases since FY 2013.

Specific examples of notable investigatory and enforcement outcomes for disability-related cases in recent fiscal years include:

- FY 2014: CRC entered into a Conciliation Agreement<sup>327</sup> with a workforce development center, pursuant to which the center agreed that it would not require persons who have, or are perceived to have, disabilities to be assessed for or participate in disability-specific services before, or as a condition of, receiving any services that are not disability-specific.
- FY 2015: CRC entered into a Conciliation Agreement, consolidating five separate complaints, with a residential job training program. The program agreed that it would conduct appropriate assessments before rejecting applicants or dismissing participants on the basis that they posed a direct threat as the result of a disability or medical condition, and that it would revise its policies and procedures related to direct threats.



- FY 2016: CRC issued an Initial Determination finding that a county had engaged in disparate treatment of customers with disabilities, by denying them training funds (to avoid what the county believed would be negative performance results), and by steering them to other entities for separate services. The Determination also found that the county had retaliated against employees for protesting this treatment of customers with disabilities.<sup>328</sup>
- FY 2017: CRC issued an Initial Determination finding that a service provider had discriminated against a participant in a job training program by putting her on leave without pay and attempting to transfer her to a new host agency. CRC eventually entered into a Conciliation Agreement under which the service provider was required to retain experts to evaluate the participation of people with disabilities in its programs, as well as to provide back pay and interest to the Complainant.
- FY 2018: CRC entered into Settlement Agreements with two related State agencies in a case involving a deaf worker’s compensation claimant. As with the FY 2017 Agreement discussed previously, these Agreements required the agencies to retain experts to evaluate their disability-related policies, practices, and procedures—in this case, those related to the

**Other Resolutions of Disability-Related Cases from FY 2013 Through FY 2018, Q.2:**

FY	Initial Determinations/ Letters of Finding Finding Violation(s)	Final Determinations Finding No Reasonable Cause to Believe a Violation Took Place	Conciliation/ Settlement Agreements— Disability-Related Relief	Conciliation/ Settlement Agreements— No Disability-Related Relief*
2013	1	1		
2014		5	2 (1 discussed previously under FY 2014)	1
2015		4	8**	2
2016	2	1	2	2
2017	1 (discussed previously)	12	3 (1 discussed previously)	2
2018 (Qs. 1 and 2)		8	2 (discussed previously)	

\*Although these cases originally raised disability-related allegations, CRC did not find any substantive violations of disability nondiscrimination law. Rather, the agreements were based on CRC’s findings that the relevant respondents had violated technical requirements, such as those requiring them to retain demographic data for a particular period of time.

\*\*This number includes the five consolidated cases discussed previously, as well as three agreements resolving three additional cases.

workers' compensation claims filing process and the processes for providing equally effective communications with persons with disabilities. The Agreements also required the agencies to submit to CRC for approval proposed changes to their policies, practices, and procedures, to train their employees, and to conduct outreach to local organizations, including advocacy organizations representing people who are deaf and hard of hearing. Finally, one of the agencies was required to pay compensatory damages to the claimant.

6. How does the CRC assess, investigate, and adjudicate complaints of discrimination of a person with a disability?

CRC receives complaints, including disability-related complaints, either directly from complainants / their representatives, or through referral from other Federal departments and agencies.

Each complaint is initially assessed by a CRC Intake Equal Opportunity Specialist (EOS) to determine appropriate action, including whether the complaint should be accepted for investigation. This assessment considers four main criteria: (1) whether the complaint is complete; (2) whether it was filed timely; (3) whether it alleges discrimination on a basis prohibited by a law enforced by CRC (or retaliation for activity protected by one or more of such laws); and (4) whether CRC has jurisdiction over the entity alleged to have discriminated / retaliated.

With regard to completeness and timeliness, where a complaint is not complete, the Section 504 and WIOA Section 188 regulations require CRC to make reasonable efforts to obtain the missing information. Therefore, before closing a complaint under these circumstances, CRC will contact the Complainant to seek whatever information has not been provided, such as by asking the Complainant to complete CRC's Complaint Information Form (CIF) or to respond to an individually-drafted Intake Questionnaire. Similarly, if a complaint is untimely filed, CRC will invite the Complainant to explain the late filing; the Director has authority to extend the filing period for good cause. However, if it does not receive the necessary information, CRC will close the complaint with an explanatory letter.

With regard to jurisdiction, the statutory jurisdiction of CRC's external program that most directly impacts individuals with disabilities is described in our response to Question 4. A large majority of the complaints CRC receives, including those alleging disability discrimination, fall outside of its jurisdiction. Where possible, those complaints are transferred to an appropriate Federal, State, or local authority. CRC also has joint or dual jurisdiction with other Federal agencies (such as the Equal Employment Opportunity Commission) over certain complaints and will refer such complaints to such other agencies under circumstances specified by regulation and send a letter to the complainant indicating why CRC made the referral. See, e.g., 29 CFR 38.80-81.

Complaints that satisfy the four criteria listed previously in this response, and that are not required to be transferred to another Federal agency, are accepted for investigation / attempted resolution except in rare cases, such as those in which CRC has already issued a decision regarding the same facts or those in which the facts alleged by the Complainant, even if true, would not

constitute a violation of the laws enforced by CRC. CRC sends letters to Complainants in these cases, or otherwise communicates in the method requested by a Complainant with a disability, explaining why their complaints will not be accepted for investigation.

Once accepted, individual complaints are usually investigated through written questions and/or telephone interviews. For Complainants with disabilities, CRC gives primary consideration to the communication method requested by the individual with a disability. For example, in one individual disability case, CRC conducted calls via videophone, providing both American Sign Language interpreters and Certified Deaf Interpreters at the Complainant's request.

CRC makes every effort to conduct on-site investigations of complaints alleging systemic discrimination. In recent years, the vast majority of such allegations that related to disability have involved statewide systems for filing benefits-related claims and appeals, such as those for unemployment insurance (UI) or workers' compensation. However, these cases are comparatively rare. Most disability complaints that CRC receives contain individual allegations.

When CRC has investigated a complaint and, based on the evidence, finds no reasonable cause to believe that a violation has taken place, CRC will close a case by issuing a Final Determination explaining the agency's reasoning. For a discussion of adjudication and resolution where a violation has been found, see our response to Question 9.

7. Does CRC's process for enforcing Section 188 of the Workforce Innovation and Opportunity Act differ from the general investigation and enforcement processes?

No, it does not. CRC uses the same process for enforcing WIOA Section 188 (specified in the regulations at 29 CFR Part 38) as it uses to enforce other statutes, including Section 504 and ADA Title II.

8. How are investigations prioritized? How are investigators assigned to a charge?

Since at least 2013 to the present, the highest priority for investigation has been given to complaints alleging systemic discrimination, particularly those involving disability. The more complex cases are assigned to the more experienced investigators to the extent possible; otherwise, cases are assigned to investigators on a rotating basis in the order in which the cases are identified as suitable for investigation.

9. When a CRC investigation identifies a violation, what is the procedure for resolving the violation?

Generally, where CRC's interactions with the Respondent during the investigation have indicated that the Respondent may be open to a voluntary resolution, then CRC will contact the Respondent and offer the opportunity to enter into a settlement agreement before the issuance of a formal decision finding a violation. Such an agreement will require the Respondent to make changes in order to prevent future discrimination, as well as providing appropriate individual relief to the Complainant(s). If the Respondent is not interested in voluntary resolution, or if negotiations are unsuccessful, CRC has the option of issuing a formal Initial Determination or Letter of

Findings discussing its reasons for concluding that the Respondent has violated the law. Both the Complainant(s) and the Respondent will receive copies of such formal documents. At that point, the Respondent has another opportunity for voluntary compliance through the signing of a Conciliation Agreement.

10. When a CRC investigation identifies a violation and a resolution is not achieved, what is the process for enforcement, including DOL enforcement or referral to another agency (e.g., DOJ)? What remedies are available?
  - a. With respect to ADA Title II cases, if the public entity declines to enter into voluntary compliance negotiations or if negotiations are unsuccessful, the matter is referred to the Attorney General with a recommendation for appropriate action.
  - b. With respect to cases under WIOA Section 188, if the CRC Director concludes that compliance cannot be secured by voluntary means, the Director must either:
    - i. Issue a final determination of a violation pursuant to 29 CFR §38.96;
    - ii. Refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; or
    - iii. Take such other action as may be provided by law. 29 CFR §38.95.

If compliance is not achieved after issuance of a final determination of a violation, or if a conciliation agreement is breached, the Secretary of Labor may:

- Suspend, terminate, deny, or discontinue WIOA Title I financial assistance, in whole or in part (after the opportunity for a hearing) or
  - Take the same actions described in (b)(ii) and (b)(iii) previously.
- c. With respect to cases under Section 504, where a recipient of federal financial assistance is found to have discriminated against individuals on the basis of disability, the recipient may be required to take such remedial action as CRC<sup>329</sup> deems necessary to overcome the effects of the discrimination. Additionally, where another recipient exercises control over the recipient that has discriminated, either or both recipients may be required to take remedial action. 29 CFR §32.6. If the relevant recipients fail or refuse to do so, the options available to CRC and DOL are similar to those under WIOA Section 188. See 29 CFR §32.46.
11. What is the role of mediation in the CRC complaint handling process related to disability discrimination? How does the CRC encourage the use of mediation by both the charging party and the covered entity? Under what circumstances are professional or private mediators or DOL staff mediators used?

In cases deemed appropriate by the CRC Director, CRC may offer Complainants and Respondents the option of alternative dispute resolution (ADR). In such circumstances:

- a. ADR is voluntary; consent must be given by the Complainant and Respondent before the ADR process will proceed.

- b. The ADR will be conducted under the guidance of the Director.
- c. ADR may take place at any time after a complaint has been filed, as deemed appropriate by the Director.
- d. CRC will not suspend its investigation and complaint processes during ADR. [29 CFR §38.85]

In its letters notifying Complainants and Respondents that a particular complaint is being accepted for investigation, CRC includes the following statement:

CRC encourages early settlement of complaints. If you wish to settle this complaint, either now or at any point before CRC issues a written decision, please inform CRC. CRC will conduct discussions, or take other appropriate steps, to ensure that all necessary issues are addressed effectively in any conciliation/settlement agreement.

If both the Complainant and the Respondent indicate an interest in settlement at the acceptance phase, CRC will conduct ADR or use another appropriate resolution method.

CRC does not use formal mediation for its external cases, through either professional or private mediators or DOL staff mediators.

The aforementioned does not preclude CRC from handling negotiations with Respondents where it believes a violation of the law may have taken place, in order to ensure that all necessary actions are taken to prevent future discrimination. CRC does consult with Complainants to clarify what their desired resolution would be in a particular case before entering into such negotiations. However, as the CRC represents the interests of the United States, the Complainants are not signatories to such agreements, and the final decision re: the terms of the agreements lies with CRC.

12. To what extent does CRC pursue agency-initiated compliance reviews or investigations or Secretary's charges in the absence of a complaint of disability discrimination? What is the process for such agency-initiated investigations?

CRC's Office of Compliance Assistance and Policy (OCAP) is generally responsible for conducting compliance reviews of entities that are within the jurisdiction of CRC's external program. However, the enactment of WIOA in FY 2014 required OCAP not only to promulgate new implementing regulations for the statute's nondiscrimination provisions, but also to provide considerable amounts of training and compliance assistance to State and local Equal Opportunity (EO) Officers<sup>330</sup> regarding these new regulations. These efforts consumed significant OCAP resources during the relevant period, limiting OCAP's (and CRC's) ability to conduct compliance reviews over the past several years. The procedures for conducting compliance reviews are set forth in 29 CFR §§ 38.62-38.64. The procedures include such steps as notification letters; submission of information, records, and/or data; desk audits and/or on-site visits, depending upon the subject of the review; and issuance of a written document summarizing the findings of the review.

13. To what extent does CRC use “testing” or other methods to identify disability discrimination?

To date, CRC has not used unidentified “testers” for on-site visits in disability cases. To the extent that OEE has investigated disability cases on site, its investigators have identified themselves when arriving at Respondents’ facilities.

In past cases involving respondents’ on-line systems for benefits claims and appeals processing (e.g., for state UI benefits), CRC has sought and obtained access to respondents’ systems and reviewed them from the perspective of a customer, using screen reader software such as Job Access With Speech (JAWS).

14. Are there methods by which more urgent or significant complaints are “triaged” or prioritized for different handling?

The CRC Director and the Chief of OEE have the authority to triage or prioritize incoming complaints, including those related to disability. Since at least 2013 to the present, the highest priority has been given to complaints alleging systemic discrimination, particularly those based on disability. As noted previously in our response to Question 6, CRC generally prefers to investigate such complaints on site.

15. What is the process by which the CRC engages in conciliation after a “cause” finding?

See response to Question 9.

16. What is the process by which the CRC interacts with other federal agencies to enforce disability civil rights laws, especially with Department of Labor’s OFCCP and WHD, the Department of Education, and the Department of Justice? What is the process by which the CRC engages with the Department of Justice over potential litigation of disability rights complaints?

CRC receives complaint referrals from other federal agencies, particularly the U.S. Department of Justice (DOJ). It also refers or transfers complaints, including disability complaints, to other federal agencies (including within DOL) where CRC does not have jurisdiction, or where CRC and the other agency have dual jurisdiction over the complaint. See 29 CFR 38.81(c); see also response to Question 6. With regard to individual employment complaints alleging disability discrimination over which CRC would otherwise have jurisdiction, CRC is required to notify the Complainant that the complaint will be forwarded to the EEOC for investigation and processing unless the Complainant specifies a preference for CRC to handle. See 29 CFR §1640.6. CRC occasionally has informal discussions with other agencies, such as the Department of Education, regarding the agencies’ respective handling of particular types of complaints, including disability-related complaints.

With regard to potential litigation by DOJ of disability rights complaints under the laws enforced by CRC: over the past several years, the process has consisted of informal discussion by staff-level employees and managers of each agency of the relative strengths and weaknesses of a particular case, along with review by DOJ of relevant documentation. As of the date of these responses, the

referral process in disability rights cases has not progressed beyond this point. If DOJ expresses an interest in litigation of a particular case, the case will go through a formal referral process, pursuant to the regulations implementing the statute(s) at issue.

17. What is CRC's policy for providing reasonable accommodations during the investigations process (e.g. to assist a charging party with a disability? During mediation or settlement discussions?)

CRC conducts most of its investigations of individual complaints on a long-distance basis (*i.e.*, not on site). Therefore, its focus during the investigation is largely related to providing equally effective communications for Complainants with disabilities. See discussion in our response to Question 6. To the extent that a Complainant (or a representative of a Respondent) who has a disability requests reasonable accommodations, CRC will make every effort to provide such accommodations.

18. How does CRC provide training on investigations, negotiations, and enforcement action for CRC staff on disability-based discrimination?

During FY 2015, CRC developed and presented an intensive four-day Training Academy for OEE staff, and followed up with several stand-alone training sessions. This training was designed to bolster staff knowledge of rigorous methods of conducting effective investigations, as well as substantive knowledge; it was taught by experts from DOJ's Civil Rights Division, DOL's own Office of the Solicitor, and other Federal agencies. Subjects covered included disability-based discrimination. Since that time, CRC has provided substantive training, and training on investigative and enforcement methods, to OEE staff on an ongoing basis. For example, CRC takes advantage of periodic training sessions offered by DOJ.

In December 2017, OEE staff attended CRC's State Level Equal Opportunity Officer Conference (training) which included a session by the U.S. Access Board and a disability roundtable (in conjunction with ODEP) about the disability-related nondiscrimination provisions in the Section 188 regulations. The Acting Chief of OEE also held a mandatory training for OEE staff in November 2017 about the requirements in the Section 188 regulations as they relate to individuals with disabilities.

19. What information does CRC provide to the public on its investigation and enforcement process and procedures for disability-based complaints?

See CRC website at [www.dol.gov/crc](http://www.dol.gov/crc), "External Enforcement." The investigation and enforcement processes are described in the WIOA nondiscrimination regulations at 29 CFR §38.69 et seq.

20. What are the overall enforcement and investigatory outcomes of the CRC in regards to disability since 2008?

See response to Question 5.

21. How long do complaint investigations, resolutions, and enforcement actions take?

OEE's focus during the past several fiscal years has been on clearing a backlog of cases. In addition, the complexity of each complaint, and hence of the relevant complaint investigation and resolution process, varies widely. However, CRC does have standard performance expectations for its investigators, including expectations regarding how long each step in the investigative process should take, time frames for submission of drafts of Initial and Final Determinations, and target dates for achieving resolution following the issuance of an Initial Determination.

22. How timely, at what stages, and by what methods are complainants informed of progress and outcomes of their complaints?

Under CRC's intake procedures and the Section 188 regulations, Complainants are to be notified about the status of their complaints, including whether or not the complaint will be accepted and investigated by CRC. Notifications are customarily accomplished by either postal mail or email, depending on how the complainant has contacted CRC. If a Complainant with a disability has requested a particular communication method, CRC will give primary consideration to that method. When a complaint has been accepted for investigation, the Complainant is usually contacted during the investigation to answer questions and provide documentary evidence, as described in our response to Question 6. They are also contacted to the extent appropriate during any attempted resolution of a case. See our response to Question 11. If CRC issues a written Determination or Letter of Findings on a case, the Complainant will receive a copy. The Complainant will also be notified if voluntary resolution has been reached in a case.

23. How has the CRC adjusted its enforcement strategies to address new and emerging employment models, such as online job advertising, telecommuting/work-at-home jobs, and the "gig" economy?

CRC's jurisdiction is focused largely on the workforce development system and similar State and local entities that provide employment-related services to individual customers. Therefore, subjects such as telecommuting/work-at-home jobs and the "gig" economy usually do not arise as issues related to potential discrimination in CRC cases. CRC addresses online job advertising to the extent that State and local entities under its jurisdiction provide such advertising through the workforce development system. For example, in collaboration with DOL's Employment and Training Administration (ETA), CRC issued several guidance documents to covered entities, cautioning them that excluding unemployed individuals (especially the long-term unemployed) and those with negative credit histories from employment opportunities, including through electronic job banks/screening processes, may have a disparate impact on members of particular protected groups, including those with disabilities.

Similarly, as discussed in our answers to other questions, CRC has adjusted its enforcement strategy to prioritize systemic cases, particularly those alleging discrimination against individuals with disabilities. The majority of those cases have involved online systems for filing



employment-related benefits claims and appeals, particularly with regard to UI. As with the two topics mentioned previously in this response, CRC has partnered with ETA to issue a guidance document emphasizing the need to ensure that such systems are accessible to those with disabilities, as well as members of other groups.

24. To what extent are enforcement priorities and strategies established by CRC? What are the specific enforcement priorities related to people with disabilities?

See responses to Questions 8 and 14.

25. Has the CRC developed a strategic plan? If so, how has the plan been implemented?

CRC is a component agency of DOL's Office of the Assistant Secretary for Administration and Management (OASAM). As such, CRC provides direct support and contributes to DOL's strategic goals and objectives. CRC has an Operating Plan for each fiscal year that contains performance measures and milestones. Since FY 2016, for its external enforcement program, CRC has prioritized case processing efficiency, and implementation of WIOA Section 188. Both the milestones/benchmarks that were established and the targets that were set for key performance indicators reflect this prioritization in the Operating Plans for FYs 16, 17 and 18.

26. What is the process by which the CRC identifies issues for, and develops and publicizes, policy and sub-regulatory guidance?

CRC's OCAP is responsible for developing, and working with other DOL agencies to develop, policy documents and sub-regulatory guidance for the external program. As discussed in our answer to Question 12, OCAP has been primarily focused for the past few fiscal years on promulgating regulations implementing WIOA Section 188, as well as on providing training and compliance assistance regarding those new regulations. CRC has partnered with other DOL agencies to develop and issue such documents as the guidance documents discussed in our response to Question 23. CRC has also partnered with DOL's Office of Disability Employment Policy (ODEP) and other DOL agencies to issue a Section 188 Disability Reference Guide for entities within the nation's workforce development system. The Reference Guide is a document established through the collaborative efforts of multiple agencies within DOL as well as the National Disability Institute's Lead Center. The Guide is designed to assist American Job Centers (AJCs) by providing promising practices (as collected through state memorandum of agreement plans, the National Association of State Workforce Agencies, and Disability Employment Initiative grantees) that correlate with specific nondiscrimination and equal opportunity requirements of WIOA Section 188 and its implementing regulations. While the Guide is focused on AJC programs, it is also a useful tool for any entity that desires to ensure nondiscrimination and equal opportunity for individuals with disabilities in the workforce development system. CRC and its partner agencies are in the process of revising and updating the Guide. These guidance documents are issued to appropriate stakeholders within the workforce development system, and are also posted on DOL's website.

CRC intends to identify topics for future policy and guidance documents by tracking emerging issues that are raised in requests for compliance assistance and training, as well as those identified in complaints or complaint investigations. CRC will also continue to partner with other DOL agencies to pinpoint appropriate issues for sub-regulatory guidance and other policy documents.

27. What training does the CRC offer or conduct for people with disabilities, their family and friends, and service providers about disability rights laws it enforces?

CRC has provided webinars specifically for, or that include, people with disabilities, their advocates, and service providers about the Section 188 regulations. CRC has also presented in-person training about other disability-related topics at conferences for those service providers and others within the workforce development system.

28. What training does the CRC offer or conduct for covered entities about the disability rights laws it enforces?

CRC provides webinars and in person trainings at conferences about the disability rights laws it enforces upon request, and as resources permit.

29. How does the CRC publicize the outcomes of its investigations and cases?

CRC publicizes appropriate cases in which conciliation or settlement agreements have been reached, through posting on its website and issuance of press releases. CRC does not publicize the completion of investigations, or the issuance of Initial Determinations or Letters of Finding, because those cases have not yet reached resolution.

30. How does the CRC assess the effectiveness of its dissemination methods?

A comparison of the number of comments received after publication of the Notice of Proposed Rulemaking (NPRM) to implement WIOA Section 188 and the number of comments received after publication of the Interim Final Rule to implement WIA Section 188 (the predecessor to WIOA Section 188) reflects the vast increase in CRC's public profile over a period of approximately twenty years. After the WIA Section 188 Interim Final Rule was published in November 1999,<sup>331</sup> CRC received about 15 comments on the rule, largely from State and local workforce agencies. By contrast, CRC received 360 comments on the WIOA Section 188 NPRM.<sup>332</sup> These comments came from a wide variety of stakeholders, including State and local agencies; religious organizations; labor organizations; and civil rights and advocacy groups, such as language access organizations and disability rights organizations.

31. What barriers exist that hinder the ability of the CRC to fulfill its mission?

As noted in the preamble to the final rule implementing WIOA Section 188, CRC is particularly concerned about the increased integration of, and in some instances complete shift to,

online service delivery models in the workforce development system. See 81 FR 87130, "Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act," at 87136, "Increased Provision of Services Using Technology, Including the Internet." A 2012 Pew Research Center study cited in that preamble concluded that adults with disabilities were significantly less likely to use the Internet than adults without disabilities. In addition, complaint investigations conducted by CRC have indicated that implementation of such online service delivery models does not always adequately take into consideration the needs of individuals with disabilities. At its current resource levels, CRC cannot initiate many compliance reviews of the online systems of covered entities to determine whether those systems provide sufficient / meaningful access. We are therefore reliant on individuals and advocacy organizations to file complaints bringing to our attention allegations of potential discrimination in such systems, prompting us to conduct appropriate investigations.

32. What changes have occurred in staffing levels since 2008?

As of 9/30/2010, CRC's OEE had a total of 11 staff members, including eight (8) Equal Opportunity Specialists, two (2) Equal Opportunity Assistants, and one (1) Supervisory Equal Opportunity Specialist. OCAP had two (2) Equal Opportunity Specialists, one (1) Equal Opportunity Assistant, one (1) Special Assistant, one (1) Senior Policy Advisor, and one (1) Supervisory Equal Opportunity Specialist.

As of the beginning of Q3, FY 2018, the nine (9) full-time staff members that comprise OEE include seven (7) Equal Opportunity Specialists, and two (2) Equal Opportunity Assistants. The OEE Supervisory Equal Opportunity Specialist position is currently vacant but the position is expected to be filled prior to the end of the fiscal year. In OCAP, there are a total of 6 full-time staff, including one (1) Bilingual Administrative Support Specialist, two (2) Equal Opportunity Specialists, two (2) Senior Policy Advisors, and one (1) Supervisory Equal Opportunity Specialist.

33. What additional steps, not covered previously, has CRC taken in response to the recommendations in the 2000 NCD Report, Promises to Keep?

Recommendation 18 in the 2000 NCD Report, Promises to Keep, suggested that the seven designated agencies under Title II of the ADA (which includes DOL) should refer Title II cases suitable for litigation to the Department of Justice. This issue is discussed in our response to question 16.

34. How does CRC identify issues for, and develop and publicize, policy and sub-regulatory guidance and case outcomes? How does CRC assess the effectiveness of its dissemination efforts?

See responses to questions 26, 29 and 30.

35. What are the regulatory goals of the CRC for the next two years? What are the sub-regulatory guidance goals of CRC for the next two years?

Promulgation of the regulations implementing WIOA Section 188 has been CRC's primary regulatory goal and activity for the past several fiscal years. Now that the WIOA Section 188 final rule has been published, CRC's next regulatory goal is the rescission of the outdated regulations implementing the nondiscrimination and equal opportunity provisions of the Job Training Partnership Act (the predecessor to WIA). This Act sunsetted on July 1, 2000; therefore, its implementing regulations (published at 29 CFR Part 34) are appropriate for rescission.

With regard to sub-regulatory guidance, CRC's goals for the next two years are not yet defined. However, an enforcement strategy for OCAP is to be developed by the end of FY 2018, per CRC's Operating Plan. This strategy may include the development of such guidance.

## Endnotes

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- 1 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990); 42 U.S.C. § 12101, *et seq.* (2008).
- 2 National Council on Disability. 2000. *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act*. Washington, DC: National Council on Disability, 20. [https://ncd.gov/rawmedia\\_repository/497e788f\\_1ab2\\_4ae2\\_b240\\_4aefa363230c.pdf](https://ncd.gov/rawmedia_repository/497e788f_1ab2_4ae2_b240_4aefa363230c.pdf).
- 3 *Ibid.*, 1.
- 4 *Ibid.*, 2.
- 5 *Ibid.*
- 6 *Ibid.*, 5–6.
- 7 ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; 154 Cong. Rec. H8,286–8,398 (2008), Cong. Rec., S8,342–8,356 (2008).
- 8 Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (2008).
- 9 Workforce Innovation and Opportunity Act, Pub. L. No. 113-128, 128 Stat. 1425 (2014).
- 10 Barry, Dan. 2016. *The Boys in the Bunkhouse*. New York: HarperCollins.
- 11 Dart, Justin. Feb. 6, 1992. “Related Quotes by Justin Dart.” Speech given in Toronto, Canada. <http://mn.gov/mnnddc/ada-legacy/pdf/related-quotes-by-justin-dart.pdf>. (Accessed June 24, 2018).
- 12 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).
- 13 U.S. Equal Employment Opportunity Commission. *Strategic Plan for Fiscal Year 2012–2016*, 6. [https://www.eeoc.gov/eeoc/plan/upload/strategic\\_plan\\_12to16.pdf](https://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf).
- 14 U.S. Equal Employment Opportunity Commission. *2017 Performance and Accountability Report*, Appendix A, 87–88. <https://www.eeoc.gov/eeoc/plan/2017par.cfm>.
- 15 Fed. Reg. 16,978 (March 25, 2011).
- 16 *Ibid.*
- 17 *Ibid.*
- 18 *Ibid.*
- 19 *Ibid.*
- 20 Examples included by the EEOC in the list include the following: “Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.” 29 C.F.R. § 1630.2.
- 21 29 C.F.R. Part 1630, App.
- 22 U.S. Equal Employment Opportunity Commission. “What You Should Know About EEOC Regulations, Sub-regulatory Guidance and Other Resource Documents.” [https://www1.eeoc.gov/eeoc/newsroom/wysk/regulations\\_guidance\\_resources.cfm?renderforprint=1](https://www1.eeoc.gov/eeoc/newsroom/wysk/regulations_guidance_resources.cfm?renderforprint=1). (Accessed June 23, 2018).
- 23 *Ibid.*

- 24 U.S. Equal Employment Opportunity Commission. “General Fact Sheet on ADAAA Regulations.” [https://www.eeoc.gov/laws/regulations/adaaa\\_fact\\_sheet.cfm](https://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm). (Accessed June 23, 2018). U.S. Equal Employment Opportunity Commission. “General Q&As on ADAAA.” [https://www.eeoc.gov/laws/regulations/ada\\_qa\\_final\\_rule.cfm](https://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm). (Accessed June 23, 2018). U.S. Equal Employment Opportunity Commission. Small Business Q&As on ADAAA. [https://www.eeoc.gov/laws/regulations/adaaa\\_qa\\_small\\_business.cfm](https://www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm). (Accessed June 23, 2018).
- 25 U.S. Equal Employment Opportunity Commission. “Living with HIV.” [https://www.eeoc.gov/eeoc/publications/hiv\\_individual.cfm](https://www.eeoc.gov/eeoc/publications/hiv_individual.cfm). (Accessed June 23, 2018).
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- 27 U.S. Equal Employment Opportunity Commission. May 9, 2016. “Employer Provided Leave and the Americans with Disabilities Act.” <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>.
- 28 U.S. Equal Employment Opportunity Commission. (All of the following accessed June 23, 2018). “EEO Laws for Employees Affected by the Zika Virus,” <https://www.eeoc.gov/eeoc/publications/zika-eeo-laws.cfm>; “Questions and Answers About Deafness and Hearing Impairments in the Workplace and the Americans with Disabilities Act,” [https://www.eeoc.gov/eeoc/publications/qa\\_deafness.cfm](https://www.eeoc.gov/eeoc/publications/qa_deafness.cfm); “Questions & Answers About Blindness and Vision Impairments in the Workplace and the Americans with Disabilities Act (ADA),” [https://www.eeoc.gov/eeoc/publications/qa\\_vision.cfm](https://www.eeoc.gov/eeoc/publications/qa_vision.cfm); “Questions & Answers About Diabetes in the Workplace and the Americans with Disabilities Act (ADA),” <https://www.eeoc.gov/laws/types/diabetes.cfm>; “Questions & Answers About Epilepsy in the Workplace and the Americans with Disabilities Act (ADA),” <https://www.eeoc.gov/laws/types/epilepsy.cfm>; “Questions & Answers About Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act (ADA),” [https://www.eeoc.gov/laws/types/intellectual\\_disabilities.cfm](https://www.eeoc.gov/laws/types/intellectual_disabilities.cfm); “Questions & Answers About Cancer in the Workplace and the Americans with Disabilities Act (ADA),” <https://www.eeoc.gov/laws/types/cancer.cfm>; ““Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights,” [https://www.eeoc.gov/eeoc/publications/mental\\_health.cfm](https://www.eeoc.gov/eeoc/publications/mental_health.cfm).
- 29 U.S. Equal Employment Opportunity Commission. “The Mental Health Provider’s Role in a Client’s Request for a Reasonable Accommodation at Work.” [https://www.eeoc.gov/eeoc/publications/ada\\_mental\\_health\\_provider.cfm](https://www.eeoc.gov/eeoc/publications/ada_mental_health_provider.cfm). (Accessed June 25, 2018).
- 30 75 Fed. Reg. 68,912 (Nov. 9, 2010).
- 31 *Ibid.*
- 32 *Ibid.*
- 33 *Ibid.*
- 34 *AARP v. EEOC*, 267 F.Supp.3d 14, 20 (D.D.C. 2017).
- 35 *Ibid.* Specifically, the Affordable Care Act amended the Health Insurance Portability and Accountability Act (HIPAA).
- 36 81 Fed. Reg. 31,143 & 31,126 (May 17, 2016).
- 37 *Ibid.*
- 38 *AARP*, 267 F.Supp.3d at 21.
- 39 *Ibid.*
- 40 29 U.S.C. § 791.
- 41 Executive Order 13548 (July 26, 2010).
- 42 79 Fed. Reg. 27,824 (May 15, 2014).
- 43 81 Fed. Reg. 9,126 (Feb. 24, 2016).
- 44 82 Fed. Reg. 654 (Jan 3, 2017).
- 45 *Ibid.* Personal assistance services are services that help someone perform basic activities such as eating and using the restroom. They are not the same as services that help the person perform job-related tasks, such as sign language interpreters or readers for persons who are blind or have learning disabilities.
- 46 National Council on Disability. *Promises to Keep*, 163.
- 47 U.S. Equal Employment Opportunity. *Strategic Plan: FY 2018–2022*, 2. [https://www.eeoc.gov/eeoc/plan/strategic\\_plan\\_18-22.cfm](https://www.eeoc.gov/eeoc/plan/strategic_plan_18-22.cfm). (Accessed June 25, 2018).

- 48 Ibid.
- 49 U.S. Equal Employment Opportunity. *Strategic Plan: FY 2012–2016*, 11. [https://www.eeoc.gov/eeoc/plan/strategic\\_plan\\_12to16.cfm](https://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm). (Accessed June 25, 2018).
- 50 U.S. Equal Employment Opportunity Commission. *Strategic Enforcement Plan: FY 2017–2021*, 6. <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>. (Accessed June 25, 2018).
- 51 U.S. Equal Employment Opportunity Commission. *Strategic Enforcement Plan: FY 2013–2016*. <https://www.eeoc.gov/eeoc/plan/sep.cfm>. (Accessed June 25, 2018).
- 52 U.S. Equal Employment Opportunity Commission. *Strategic Enforcement Plan: FY 2017*, 9. (Accessed June 25, 2018).
- 53 National Council on Disability. *Promises to Keep*, 163.
- 54 Ibid., 241.
- 55 U.S. Equal Employment Opportunity Commission. *Strategic Enforcement Plan: FY 2017*, 6.
- 56 National Council on Disability. *Promises to Keep*, A-12.
- 57 Calculations based on EEOC enforcement data. <https://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm>.
- 58 Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination in employment based on race, sex, religion, color, and national origin, while the Age Discrimination and Employment Act prohibits discrimination for individuals age 40 or older. Charges based on color increased by 102 percent comparing the 2000–2008 and 2009–2017 periods, but the increase in the number of charges based on color was 13,265 compared with an 85,236 increase in charges based on disability. Because GINA did not go into effect until 2009, comparing those increases against the ADA would not yield a meaningful comparison.
- 59 The largest disability category for which charges are filed with the EEOC is “other disabilities,” identified in 31 percent of all ADA charges received by the EEOC since 2000.
- 60 The EEOC reports zero PTSD cases in FY 2000–2003.
- 61 U.S. Equal Employment Opportunity Commission. “Definitions of Terms.” <https://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm>. “Merit resolutions” include “negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations.”
- 62 Calculations based on EEOC enforcement data. <https://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm>.
- 63 National Council on Disability. *Promises to Keep*, 182–188.
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- 65 Ibid.
- 66 Researchers did not look into whether any variation exists between the quality of the EEOC and contract mediators.
- 67 U.S. Equal Employment Opportunity Commission. *Strategic Enforcement Plan: FY 2017*, 9–10.
- 68 U.S. Equal Employment Opportunity Commission. Public Portal. <https://publicportal.eeoc.gov/portal/Login.aspx?ReturnUrl=%2fportal%2f>. (Accessed April 3, 2018).
- 69 U.S. Equal Employment Opportunity Commission. “How to File a Charge of Employment Discrimination.” <https://www.eeoc.gov/employees/howtofile.cfm>. (Accessed June 25, 2018).
- 70 The webpage of the California Department of Fair Employment and Housing provides a good example. <https://www.dfeh.ca.gov/complaint-process/file-a-complaint/>. (Accessed June 25, 2018).
- 71 Internal Revenue Service provides such videos. <https://www.irs.gov/newsroom/videos-american-sign-language-asl>. (Accessed June 25, 2018).
- 72 29 C.F.R. § 1601.74. The regulations list 122 FEPAs, but note changes to agencies may occur. The EEOC reported to NCD that there are currently 92 FEPAs.
- 73 EEOC regulations on certification require that the EEOC accept at least 95 percent of the “findings and resolutions” of the FEPA. 29 C.F.R. § 1601.75(c). The EEOC is required to evaluate the FEPA at least once every three years and to conduct an inquiry if the EEOC rejects more than 5 percent of the FEPA findings at the end of the year, or 20 percent or more of the findings within two consecutive quarters. 29 C.F.R. § 1601.78.

- 74 National Council on Disability. *Promises to Keep*, 188.
- 75 U.S. Equal Employment Opportunity Commission. “Fair Employment Practices Agencies (FEPAs) and Dual Filing.” <https://www.eeoc.gov/employees/feпа.cfm>. (Accessed June 25, 2018).
- 76 The Flesch-Kincaid Grade-Level (FKGL) is “one of the most widely used” automated readability tools.” U.S. Government Accountability Office. 2016. *Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance.*” Washington, DC: U.S. Government Accountability Office, 4, n. 9.
- 77 Twelve FEPAs were randomly selected, and their websites were reviewed. The following FEPA websites had no clear indication of any workshare arrangement with the EEOC: Alaska Commission for Human Rights, Kansas Human Rights Commission, New Hampshire Commission for Human Rights, New Mexico Human Rights Commission, Ohio Civil Rights Commission, St. Louis (MO) Civil Rights Enforcement Agency, Utah Industrial Commission, Anti-Discrimination Division. The following FEPA websites had minimum mention of a role for the EEOC: Dade County (FL) Fair Housing and Employment Commission, Fort Dodge–Webster County (IA) Human Rights Commission. The following FEPA websites did mention the workshare agreement with the EEOC: Anchorage (AK) Equal Rights Commission, California Department of Fair Employment and Housing, and the Idaho Human Rights Commission. The Anchorage Equal Rights Commission was the most clear and succinct, informing the public that “the AERC also enforces the Americans with Disabilities Act of 1990 (ADA–Title I) and Title VII of the Civil Rights Act of 1964 through a work-share agreement with the federal Equal Employment Opportunity Commission (EEOC).” <https://www.muni.org/Departments/AERC/Pages/aboutus.aspx>.
- 78 *Benaugh v. Ohio Civil Rights ’Comm’n*, 278 F. App’x 501, 509–510 (6th Cir. 2008).
- 79 National Council on Disability. *Promises to Keep*, 199.
- 80 U.S. Equal Employment Opportunity Commission. July 7, 2016. *Advancing Opportunity, A Review of Systemic Programs*, 10–11. <https://www.eeoc.gov/eeoc/systemic/review/>.
- 81 Ibid.
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- 83 Ibid.
- 84 Ibid.
- 85 U.S. Equal Employment Opportunity Commission, *Strategic Enforcement Plan: FY 2017*, 10.
- 86 Ibid.
- 87 Ibid.
- 88 Ibid., and data provided by the EEOC.
- 89 ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553.
- 90 National Council on Disability. *Promises to Keep*, 193.
- 91 According to the EEOC, approval of the Commissions is required when (1) a case may involve a major expenditure of EEOC resources, including staffing and staff time, and/or expenses associated with extensive discovery or expert witnesses; (2) a case presents an issue in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals, or where the Commission has only recently adopted a position; (3) a case where the General Counsel reasonably believes to be appropriate for submission for Commission consideration, for example, because of a likelihood for public controversy; and 4) participation as a friend of the court (*amicus curiae*).
- 92 The EEOC Office of General Counsel publishes an annual report on litigation activity, <https://www.eeoc.gov/eeoc/litigation/reports/index.cfm>. The last publicly available report at the time of research for this report covered FY 2016. A subsequent report was published for FY 2017. The statistical analysis is based on information provided in these annual reports.
- 93 U.S. Equal Employment Opportunity Commission. *Strategic Enforcement Plan FY 2017*, 4–5.



- 94 EEOC v. Hill Country Farms d/b/a as Henry's Turkey Service, 899 F. Supp. 2d 827 (S.D. Iowa 2012), *aff'd*, 564 F. App'x 868 (8th Cir. 2014).
- 95 U.S. Equal Employment Opportunity Commission. September 17, 2015. "Press Release, Henry's Turkey Service, Heirs Must Turn over Almost \$600,000 Owed to Disabled Workers." <https://www.eeoc.gov/eeoc/newsroom/release/9-17-15b.cfm>.
- 96 *Ibid.*
- 97 EEOC v. United Airlines, 693 F.3d 760 (7th Cir. 2012).
- 98 EEOC v. Humiston-Kelling, 227 F.3d 1024 (7th Cir. 2000).
- 99 EEOC v. St. Joseph's Hospital, 842 F.3d 1333, 1345 (11th Cir. 2016).
- 100 EEOC v. The Picture People, Inc., 684 F.3d 981 (10th Cir. 2012).
- 101 EEOC v. AutoZone, Inc., 707 F.3d 824 (7th Cir. 2013).
- 102 EEOC v. LHC Group, Inc., 773 F.3d 688 (5th Cir. 2014).
- 103 EEOC v. Womble Carlyle, Sandridge & Rice, LLP, 616 F. App'x. 588 (4th Cir. 2015).
- 104 EEOC v. AutoZone, Inc., 809 F.3d 916 (7th Cir. 2016).
- 105 EEOC v. Ford Motor Company, 782 F.3d 753 (6th Cir. 2015).
- 106 *Ibid.*, 782 F.3d at 757–58.
- 107 EEOC v. Old Dominion Freight Line, Inc., No. 2:11–CV–02153, 2015 WL 3895095, (W.D. Ark. June 24, 2015).
- 108 Hosanna-Tabor Evangelical Lutheran Church v. EEOC, 565 U.S. 171 (2012).
- 109 U.S. Equal Employment Opportunity Commission. November 15, 2016. *FY 2016 Performance Accountability Report*, 38. <https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf>.
- 110 *Ibid.*
- 111 *Barlia v. MWI Veterinary Supply*, 479 F.Appx. 439 (6th Cir. 2018).
- 112 National Council on Disability. *Promises to Keep*, 391–392.
- 113 42 U.S.C. § 2000e-5, incorporated by reference in 42 U.S.C. § 12117(a).
- 114 Memorandum of Understanding Between the U.S. Equal Employment Opportunity Commission and the U.S. Department of Justice–Civil Rights Division Regarding ADA and GINA Employment Discrimination Charges Against State and Local Governments. July 23, 2015. <https://www.eeoc.gov/laws/mous/eeoc-doj-ada-gina.cfm>.
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- 152 For example, ODEP works with the Department of Education's Office of Special Education and Rehabilitation Services and Rehabilitation Services Administration on youth transition issues. ODEP works with RSA on enhancing career pathway opportunities and on WIOA issues, customized employment, and discovery.
- 153 Participating agencies should include the Rehabilitation Services Administration and the Office of Special Education Programs at the Department of Education; the Vocational Rehabilitation and Employment program at the Department of Veterans Affairs; the EEOC; DOJ's Civil Rights Division; Centers for Medicare and Medicaid Services, Substance Abuse and Mental Health Services Administration, and Administration on Community Living at the Department of Health and Human Services; Social Security Administration; Office of Personnel Management; along with ETA, OFCCP, and WHD.
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- 327 Generally, a Conciliation Agreement is the document that CRC will use to achieve voluntary compliance after it has issued a Letter of Findings, Initial Determination, or similar document finding that a respondent has violated the law, e.g., 29 CFR 38.91, 38.93. A Settlement Agreement is used to achieve voluntary compliance in cases in which no formal finding of violation has been issued. All of CRC’s Conciliation Agreements and Settlement Agreements require the entities involved to take appropriate remedial actions.



- 328 This case has not yet been resolved. CRC is working with DOL's Office of the Solicitor, and previously consulted with the U.S. Department of Justice Civil Rights Division's Disability Rights Section, to determine appropriate next steps.
- 329 Although the regulatory language refers to "the Assistant Secretary," this authority has been delegated to CRC by Secretary's Order.
- 330 See 29 CFR §§38.28 through 38.33.
- 331 See 64 FR 61692 (Nov. 12, 1999).
- 332 See 81 FR 87130 (Dec. 2, 2016).



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